80-1991

No. _____

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MAY 4 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE STATE OF OREGON,

Petitioner,

v.

BRUCE ALAN KENNEDY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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QUESTION PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment bar retrial of a criminal defendant when a mistrial is granted on the defendant's motion based upon a prosecutor's improperly phrased question, which is prejudicial to the defendant, but is asked in good faith and without the intent to provoke a mistrial?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

Petitioner, the State of Oregon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on November 24, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing defendant's conviction (Appendix A) is reported at 49 Or. App. 415, 619 P.2d 948 (1980). The order of the Supreme Court of the State of Oregon denying the state's petition for review of the Court of Appeals' decision (Appendix B) is reported, officially only, at 290 Or. 551 (1981).

JURISDICTION

The judgment of the Court of Appeals of the State of Oregon was entered on November 24, 1980. The Supreme Court of Oregon denied a timely petition for discretionary review on March 4, 1981; and this petition for a writ of certiorari was filed within 60 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

United States Constitution, Amendment XIV, § 1:

". . . [N]or shall any state deprive any person of life, liberty or property, without due process of law . . ."

STATEMENT OF THE CASE

The defendant was charged by indictment with theft in the first degree. The trial began on February 27, 1980 before Circuit Judge Phillip Roth. A jury was impaneled, opening statements were made, and the state called two brief witnesses. (Tr. 1-21). Following this, the state called Otto Ewaldsen, an expert on Middle Eastern rugs, who described the rug in question to the jury and estimated its approximate value. (Tr. 28, 32). This concluded the state's direct examination of Mr. Ewaldsen. The defendant's attorney began his cross examination by asking the witness about his bias toward the victim. (Tr. 32-33). The attorney then asked the witness the following series of questions:

Q: [Mr. Elliott]: "Mr. Ewaldsen, did you not file or try to file a complaint with the district attorney's office in Medford, Oregon against Mr. Kennedy a number of years ago because he was a competitor of yours down there?

A: [Mr. Ewaldsen]: "No, I did not. Against Mr. Kennedy?

Q: "Did you file against Mr. or Mrs. Kennedy or their business venture down there?

A: "No, I did not file. I caused an inquiry to be started.

Q: "Well, did you file a complaint with the district attorney's office down there in which you charged them with fraudulent advertising?
A: "I believe we did. It's been a long time ago.
(Counsel approached the witness.)
Q: "Is that your handwriting?
A: "Yes, and it's my signature and since you've introduced this, I would like an opportunity to explain it.
Q: "Well, you —
A: "In other words, the whole document —
[THE COURT]: "Just a minute. He'll handle the questions, you handle the answers.
Q: [Mr. Elliott]: "Mr. Ewaldsen, after you went to the district attorney's office and filed this complaint against Mr. and Mrs. Kennedy or their business, nothing came of it, did it?
A: "No. I never met Mr. Kennedy. I didn't know — I mean, I never met him.
Q: "I didn't ask you whether you met him, Mr. Ewaldsen. I asked whether or not anything came of your complaint filed with the district attorney's office down there?
A: "The district attorney did not pursue it." (Tr 34-35).

Later during redirect examination the prosecutor unsuccessfully attempted to ask the witness why he had filed a complaint against the defendant. The trial court sustained a series of objections by defense attorney to this line of questioning.[1] (Tr. 62-63, 64, 65, 66). The prosecutor then asked:

[1]The Court of Appeals opinion states that the objections by defense counsel ". . . were not well taken, and the judge's rulings were probably wrong. . .". 49 Or. App. at 417.

Q: [Ms. Johnson]: "Have you ever done business with the Kennedys?

A: "No, I have not.

Q: "Is that because he is a crook? (Tr. 67)."

The defense attorney objected to the question, and requested a mistrial. The prosecutor objected to the mistrial, but the court ruled that the question was highly prejudicial to the defendant and granted the defense motion. (Tr. 68-70). The court commented that the prosecutor should have asked the witness, "Why did you not do business with Mr. Kennedy?" (Tr. 71). At the time of the motion to dismiss, Ms. Johnson testified that she did not ask the question to cause a mistrial. (Motion Transcript, p.1).[2] Ms. Johnson thought the question was relevant because the defense attorney brought up the subject matter on cross examination. (M Tr. 12). The witness had previously told Ms. Johnson that the defendant was not "honest or honest in his business dealings . . ." and that is what prompted the question. She acknowledged that the form of the question was improper. (M Tr. 12). Ms. Johnson noted that the state vigorously objected to the mistrial. After Judge Roth left the bench she went into his chambers and asked him to reconsider his ruling. (M Tr. 19).

[2]Hereinafter the Motion Transcript will be referred to as "M Tr."

The Motion to dismiss was heard before Judge John T. Murchison, who made the following findings:

> "The issue before the Court is whether or not the conduct in this matter was intentional, overreaching or in bad faith, and as the Court has reviewed the portion of the transcript which you have attached to your motion and has listened to your explanation of the circumstances of how this matter arose, it seems apparent that the objectionable statement was made in the course of an attempt to clarify matters which had been brought out on cross-examination, and this, of course, is a proper function of redirect examination.
>
> "I have reviewed the transcript and the wording, as put, and I would agree that the question was improper as put. I do not find, however, that it constitutes bad faith or was intentional impropriety. The question of whether or not it constitutes overreaching is one of those gray areas where we have to determine what "overreaching" means, and in looking to the case which the defense has cited, *United States vs. Kessler,* prosecutorial overreaching is there defined as being such as must have been a result of gross negligence or intentional misconduct which prejudiced the defendant so that he cannot receive a fair trial, and I wouldn't find that the overreaching or the erroneous conduct in this matter reaches that degree of aggravation. I don't think it amounted to gross negligence or intentional misconduct." (M Tr. 22-23).

REASONS FOR GRANTING THE WRIT

A. THE OREGON COURT OF APPEALS HAS ESTABLISHED THE LOWEST STANDARD EVER DECLARED BY AN APPELLATE COURT TO DETERMINE WHAT CONSTITUTES PROSE-

CUTORIAL MISCONDUCT WHICH BARS RETRIAL UNDER THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION.

The opinion of the Oregon Court of Appeals accepts the trial court's finding that the prosecutor did not intend to cause a mistrial;[3] however, the opinion nonetheless concludes that overreaching occurred because the prosecutor intentionally asked the question. The opinion also suggests that the subjective intent of the prosecutor should not play a pivotal role in deciding double jeopardy claims,[4] a suggestion which is inconsistent with the historical genesis of the Double Jeopardy Clause and the opinions of this Court.

In *United States v. Dinitz,* 424 U.S. 600, 96 S. Ct. 1075, 47 L.Ed.2d 267 (1976), this Court held that:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendant to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor' [citing *United States v. Jorn,* 400 U.S. 470, 485, 27 L.Ed.2d 543, 91 S. Ct. 547] threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." 424 U.S. at 611.

[3]The trial court also found as a matter of fact that the question did not constitute gross negligence under the circumstances in which it was asked.

[4]See Footnote 1 at 49 Or. App. 418.

In *Tabbs v. State,* 403 A.2d 796 (Maryland 1979), Judge Charles E. Moylan in a thorough discussion of the double jeopardy clause, summarized its historical background:

> "There was . . . an independent common law tradition, dating from early Stuart times, protecting a defendant from having his trial needlessly aborted by the crown when a prosecutor or a sympathetic judge sensed that the trial was going badly for the state. A defendant was protected from a retrial when the state . . . deliberately aborted the first trial in order to obtain hopefully more favorable conditions at a subsequent trial." 403 A.2d at 798.

In *Tabbs,* following an extensive review of the double jeopardy decisions of this Court, Judge Moylan concluded that jeopardy will only attach if the conduct by the prosecutor was done with the intent to cause a mistrial in order to gain a better forum, or in a bad faith effort to subject the defendant to multiple prosecutions.

> "* * * Without intimating even remotely that there was any negligence, gross or otherwise, we do not find it necessary to assess the facts in this regard because of our holding that negligent trial error (even gross) is not a variety of judicial or prosecutorial overreaching.
>
> "We deliberately choose this approach to the case because it is of broader precedential significance and because it may serve to lay to rest the ghost of gross negligence which is being raised with increasing and with alarming frequency in

the appeals brought to this Court. At the risk of piling Ossa upon Pelion, we attack what we deem to be this misbegotten notion on a number of fronts in the hope that the issue may be settled once and for all, definitively, exhaustively even if exhaustingly." 403 A.2d at 801.

In the present case, the opinion of the Oregon Court of Appeals has departed from the historical purpose of the Double Jeopardy Clause protection and has misinterpreted the decisions of this Court applying that protection to cases of alleged prosecutorial misconduct.

B. THERE IS CONFLICT AMONG VARIOUS FEDERAL AND STATE JURISDICTIONS IN THEIR INTERPRETATIONS OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION AS APPLIED TO CASES OF ALLEGED PROSECUTORIAL MISCONDUCT.

When the defendant successfully moves for a mistrial, the Double Jeopardy Clause does not bar reprosecution "even if defendant's motion is necessitated by a prosecutorial or judicial error." *United States v. Jorn,* 400 U.S. 470, 485, 91 S. Ct. 547, 27 L.Ed2d 543 (1970). However, retrial is barred where the error that prompted the mistrial is intended to cause a mistrial or is intended to harass the defendant. *United States v. Dinitz, supra. United States v. Scott,* 437 U.S. 82, 94, 57 L.Ed.2d 65, 98 S. Ct. 2187 (1978).

Subsequent to *Jorn,* and *Dinitz,* a split of authority arose respecting what constitutes prosecutorial over-

reaching. The majority of the cases hold that the overreaching must be with the intent either to provoke a mistrial in order to obtain hopefully more favorable conditions at a subsequent trial or to harass a defendant by successive, prolonged litigation. *People v. Gomez,* 406 N.E.2d 886 (Ill. 1980), *United States v. Calderon,* 610 F.2d 88 (9th Cir., 1980), *Tabbs v. State,* 403 A.2d 796 (Maryland 1979), *Commonwealth v. Meekins,* 403 A.2d 591 (Pa. 1979), *People v. Baca,* 562 P.2d 411 (Col. 1979), *State v. Baylor,* 587 P.2d 343 (Kan. 1978), *People v. Hathcock,* 504 P.2d 476 (Cal. 1973), *Muller v. State,* 478 P.2d 822 (Alaska 1971). Consistent with this majority view is the most recent case from the Ninth Circuit, *United States v. Roberts,* 640 F.2d 225 (9th Cir. 1981). There the prosecutor committed reversible error when he attempted to bolster the credibility of the chief prosecution witness with evidence outside the record after an objection was sustained by the trial court. The Ninth Circuit held that:

> "Although the prosecutor's comments appear to have been intentional and were not harmless, there has been no showing that the comments were deliberately made to provoke a mistrial. . . . Accordingly, we decline to extend the bar on retrial to cases involving gross negligence without the intent to provoke a mistrial." 640 F.2d at 238.

A minority of courts have held that conduct by the prosecutor, although not intentional, may be over-

reaching if it amounts to *gross* negligence. This view appears to have its beginnings in *United States v. Kessler,* 530 F.2d 1246 (5th Cir. 1976). However, even that Circuit has focused on the intent of the prosecutor and seems to have effectively repudiated or limited *Kessler* in later cases. In *United States v. Garza,* 603 F.2d 578 (5th Cir. 1979), the prosecutor made an improper reference before the jury to a matter which the court previously had ruled on, laughed during the cross examination of a state's witness, and called a witness after being told that the witness would exercise his Fifth Amendment rights. The court found the prosecutor's conduct to be "improper and prejudicial to the defendant," however, because the court could not say with assurance that the prosecutor's conduct was "motivated by bad faith," the court denied defendant's jeopardy claim on the grounds that the conduct was not intentional or grossly negligent.

The opinion of the Oregon Court of Appeals goes beyond *both* lines of cases by holding that the single question by the prosecutor, which the trial court found to be no more than mere negligence, was overreaching. This opinion thus creates yet a third standard, which has never been sanctioned by this Court.

CONCLUSION

The decision of the Oregon Court of Appeals incorrectly interpreted the Double Jeopardy Clause of the

United States Constitution. For the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Oregon.

Respectfully submitted,

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Solicitor General

JOHN C. BRADLEY
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baw

Appendix A

No. C-79-12-34399, CA 17729

IN THE COURT OF APPEALS OF THE STATE OF OREGON

State of Oregon,

Respondent,

v.

Bruce Alan Kennedy,

Appellant.

Appeal from Circuit Court, Multnomah County. John J. Murchison, Judge.

Argued and submitted October 24, 1980.

Donald C. Walker, Portland, argued the cause and filed the brief for appellant.

John C. Bradley, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were James M. Brown, Attorney General, John R. McCulloch, Jr., Solicitor General, and William F. Gary, Deputy Solicitor General, Salem.

Before Gillette, Presiding Judge, and Roberts and Campbell, Judges.

GILLETTE, P. J.

Reversed.

XKEN Filed: November 24, 1980

GILLETTE, P. J.

This is a criminal case in which the defendant's sole assignment of error is the trial court's failure to

dismiss the case against him based upon a theory of prior jeopardy. We reverse.

Defendant was charged with the theft of an oriental rug. At his first trial, one of the principal witnesses against him was a Mr. Ewaldsen, whose testimony was crucial to the prosecution's case in that it provided proof of both the value and the identity of the rug in question.

On cross-examination, the defense attorney immediately attempted to establish bias on the part of the witness by asking him is he had filed a "complaint" against the defendant with the District Attorney's office in Medford. The witness first denied doing so, but then acknowledged that he had filed a complaint charging the defendant with fraudulent advertising. Without objection by the prosecution, it was further established that the District Attorney's office had taken no formal action as a result of the complaint.

Later, during redirect examination, the prosecutor unsuccessfully attempted to ask the witness why he had filed a complaint against the defendant. The trial judge sustained a series of objections by the defense to this line of inquiry. The objections were not well taken, and the judge's rulings were probably wrong, but that is not the issue before us now. The prosecutor then asked:

"Q: (The Prosecutor): Have you ever done business with the Kennedys?

"A: No I have not.
"Q: Is that because he is a crook?"

A mistrial was immediately granted.

When the case came on for retrial, a second judge declined to grant the defendant's motion for dismissal of the charges on the ground of prior jeopardy. The defendant was then tried and convicted.

The general rule is said to be that the double jeopardy clause does not bar reprosecution, "* * * where circumstances develop not attributable to prosecutorial or judicial overreaching, * * * even if defendant's motion is necessitated by a prosecutorial error." *United States v. Jorn,* 400 US 470, 485, 91 S Ct 547, 27 L Ed2d 543 (1970). However, retrial is barred where the error that prompted the mistrial is intended to provoke a mistrial or is "motivated by bad faith or undertaken to harass or prejudice" the defendant. *United States v. Dinitz,* 424 US 600, 611, 96 S Ct 1075, 47 L Ed2d 267 (1976). Accord, *State v. Rathbun,* 37 Or App 259, 586 P2d 1136 1978), *reversed on other grounds,* 287 Or 421, — P2d —— (1979).

With respect to the first of these alternative criteria, *i.e.,* in intent to cause a mistrial, the trial court found as a matter of fact that it was not the intention of the prosecutor in this case to cause a mistrial. We are bound by this finding of fact. *State v.*

Warner, 284 Or 147, 585 P2d 681 (1978); *Ball v. Gladden,* 250 Or 485, 443 P2d 621 (1968).[1]

However, we are of the opinion that the prosecutor's conduct in this case meets one of the other forbidden criteria, *viz.,* overreaching. The comment occurred during the redirect examination of a key witness. The prosecutor's express intent was to rehabilitate the witness, who had been impeached. However, the commenting question went beyond rehabilitation and was, in fact, a direct personal attack on the general character of the defendant. As such, we think the prosecutor is charged with the knowledge that the comment—which we must treat as intentional, at least in the sense that it appears it was made deliberately and after some thought—was certain to interfere with the trial process. Defendant then was faced with a Hobson's choice—either to accept a necessarily prejudiced jury, or to move for a mistrial and face the process of being retried at a later time. There will be many circumstances in which the decision, in the face of this dilemma, to seek a mistrial will be deemed the equivalent of a waiver of a defendant's prior jeopardy rights. *See United States v. Jorn, supra,* 400 US at 485. However, this case of flagrant overreaching lies out-

[1]The trial court's conclusion was based upon its acceptance of the sworn testimony of the prosecutor, who called herself as a witness at the hearing on the motion to dismiss. As the text of our opinion, *post,* indicates, we are not sure that the subjective intent of the prosecutor should necessarily play a pivotal role in the decision as to whether or not prior jeopardy forbids retrial.

side that general rule. The facts require reversal of the defendant's conviction and his discharge on grounds of former jeopardy.

Reversed.

Appendix B

March 4, 1981

John C. Bradley
Assistant Attorney General
100 State Office Building
Salem, Oregon 97310

Re: State v. Bruce Alan Kennedy
CA 17729 SC 27521

Dear Mr. Bradley:

The Supreme Court today denied respondent's Petition for Review in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

Marilyn Hartley
Supreme Court Calendar Clerk

MH/np
cc: Donald C. Walker

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NOV 30 1981
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No. 80-1991

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF OREGON,

Petitioner,

v.

BRUCE ALAN KENNEDY,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 4, 1981
CERTIORARI GRANTED OCTOBER 13, 1981

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The following opinions and orders have been omitted in printing this appendix, because they appear on the following pages of the printed petition for certiorari:

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Dec. 7, 1979—Indictment filed in Circuit Court for Multnomah County, Oregon, accusing Kennedy of theft in the first degree.

Dec. 26, 1979—Kennedy arraigned on indictment and entered plea of not guilty.

Feb. 27, 1980—Kennedy's first trial began.

Feb. 28, 1980—Circuit court orally declared mistrial on Kennedy's motion.

Mar. 5, 1980—Formal order declaring mistrial filed.

Mar. 17, 1980—Circuit court heard and orally denied Kennedy's motion to dismiss on ground of former jeopardy; retrial began.

Mar. 19, 1980—Verdict of guilty returned.

Mar. 19, 1980—Kennedy's previously-denied motion to dismiss on ground of former jeopardy filed.

Apr. 24, 1980—Judgment entered, suspending imposition of sentence, placing Kennedy on probation for three years, and imposing court costs in the amount of $878.00.

May 22, 1980—Kennedy's notice of appeal filed.

Nov. 24, 1980—Opinion of Oregon Court of Appeals entered, reversing circuit court.

Dec. 24, 1980—State's petition for reconsideration or review filed.

Jan. 9, 1981—Order of court of appeals entered, denying reconsideration.

Mar. 4, 1981—Order of Oregon Supreme Court entered, denying review.

Mar. 16, 1981—Judgment and mandate of court of appeals issued.

May 4, 1981—State's petition for certiorari filed.

Oct. 13. 1981—Certiorari granted.

INDICTMENT

[Filed December 7, 1979]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MULTNOMAH COUNTY

THE STATE OF OREGON, Plaintiff.	)	• C79-12-34399 • DA 168843-7904 SECRET • PPB 79-19624
vs.	)	
BRUCE A. KENNEDY, Defendant.	)	INDICTMENT FOR VIOLATION OF ORS 164.055

The above-named defendant is accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime of THEFT IN THE FIRST DEGREE committed as follows:

The said defendant, between July 21, 1978 and March 30, 1979, in the County of Multnomah, State of Oregon, did unlawfully and knowingly commit theft of one (1) red Kashan persian rug, of the total value of more than Two Hundred Dollars, the property of Benjamin Aryeh, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon.

Dated December 6, 1979, at the City of Portland, in the County aforesaid.

[Signatures, indorsements, and names of witnesses examined before Grand Jury omitted in printing]

TRANSCRIPT OF FIRST TRIAL
(excerpts)

[Caption omitted in printing]

[February 27, 1980]

* * * * *

[21]

OTTO EWALDSEN, called as a witness in behalf of the plaintiff, having been duly sworn by the Clerk, was examined and testified as follows:

THE CLERK: Be seated, please. Please state your full name and spell your last name for the Court.

THE WITNESS: My name is Otto Ewaldsen and the last name is spelled E-W-A-L-D-S-E-N.

DIRECT EXAMINATION

BY MS. JOHNSON:

Q Mr. Ewaldsen, would you tell the Court how you're employed?

A I own my own oriental rug gallery.

Q Where is that?

A In Medford, Oregon.

Q What is the name of your gallery?

A Ewaldsen Gallery and Oriental Rugs.

Q Can you tell us, if you will, how long you have been in the business of oriental rugs in general?

A I have been involved in the oriental rug business for about 16 years.

Q And during that time what have you done with respect to oriental rugs?

A Well, I've been involved with all phases of the oriental rug business. I've been — of course, I buy and sell rugs.

[22]

I do a great many appraisals. I deal in the rare rug market. I've studied in most of the museums of the world, the important rug collections there, in England, Austria, Germany. I'm considered to be sort of an unusual rug dealer and also I'm considered to be a scholar —

MR. ELLIOTT: I'll object. That call [*sic*] for a conclusion of this witness, or states a conclusion.

THE COURT: All right. Just your training rather than your conclusions —

Q (By Ms. Johnson) Mr. Ewaldsen, would you —

THE COURT: — your experience.

Q (By Ms. Johnson) Would you detail for the Court and the jury the collections you have studied in the following museums: Do you have a copy of your resume with you?

A Well, I can, I think, pretty well tell you. I've studied in Victorian [*sic*] — first of all, a study collection is something different than what you would see if you just visited a museum as a visitor. The study collection is in the back room, you might say, or the special room set aside for study, so that people will have the opportunity to learn and can feel the rugs first-hand, because obviously you can't because if you

found one hanging on the wall, it would be difficult for you to study it. To study the fabric of a rug is very important and so are the knots, the way they're tied, the materials that are used, the dyes that are used,

[23]

and all this, and you have to be able to examine them beforehand, so this is why most of the museums that have rug collections have a study facility available for you.

I've studied in the Victorian [*sic*] Museum in London, the _____ Museum in Cambridge and the Oxford Museum in Oxford, the Museum of Applied Arts in Vienna. In 1978, I spent time in both East and West Berlin in the museums there. As I say, I have studied in many of them throughout the country. I have also attended symposiums. I have attended both the world conferences which are conferences — the first was in '76 in London, the second was in '78 in Munich, and these are conferences put together for scholars. They're not for dealers. They're for students of rugs or if you're an interested person, you could go: connoisseur, collector, that type of thing. The world experts are there to conduct the symposiums and, in other words, to act as teachers. I wasn't a teacher. I was a student and a learner and have done this, as I say, as much as a hobby and an avocation, as well as a vocation.

I have done thousands of appraisals of [*sic*] a very detailed appraisal form that we use which I could show you, it's in my briefcase, which I devised myself, and it is used by rug appraisers throughout —

MR. ELLIOTT: I'll object to that as hearsay.

MS. JOHNSON: Hearsay!

[24]

THE COURT: All right. Sustained as to that part.

Q (By Ms. Johnson) Mr. Ewaldsen, do you also own or collect any books on Persian rugs or oriental rugs?

A Yes. I probably have one of the largest private collections of oriental rug books in the United States. I have well over 200 volumes and countless articles which I have never inventoried, but these books go back from the early days of — well, the first book written on oriental rugs was 1880. I have most of the old ones. There are a few I'm still looking for and I have most all the new ones.

Q Have you done any teaching yourself in this area?

A Yes. I have conducted numerous classes. Well, we had a public education course connected with the Medford school district. We have also done many lectures, lectured many, many times to all sorts of service clubs and other organizations. I have — since I have studied in the conservatory laboratories both in England and in Germany, in our own store or gallery, I

have a restoration department and I have taught the women that work there myself and they have learned from me what I have learned in these other laboratories.

MS. JOHNSON: Your Honor, will the Court accept this man as a qualified witness in this area?

THE COURT: All right. You may proceed.

MS. JOHNSON: Thank you.

Q (By Ms. Johnson) Mr. Ewaldsen, I'd like to show you

[25]

what's been marked State's Exhibit 2.

(Counsel approached the witness.)

(The exhibit was handed to the witness.)

Also, I would point out to you for your attention the rug in front of us, marked State's Exhibit 3. Pursuant to my request, have you compared the rug in the photograph, Exhibit 2, with this rug?

A Yes, I have, if that's the rug that was in the jury room earlier.

Q Okay. If you want, would you like to get down and look at it?

A I will, just to be sure.

(The witness stepped down to the easel which was located in front of the jury panel.)

This is the rug.

Q This is the rug that you examined?

A Yes.

Q Will you tell us, first of all, what kind of rug this is?

A This is a Kashan. It's made in Iran. When that rug was made, it was known as a Persian.

Q What does "Kashan" mean?

A The word "Kashan" comes from the community or the village Kashan. Most Iranian rugs bear the name of the village in which they were made or the neighborhood in which they were

made, except for tribal rugs and they're named after the tribes they come from.

Q Does this village produce a particular pattern or design for each rug or is that a general thing?

A Generally, they produce a very similar design. They also — the more important thing is the weave. The weave in each rug is quite distinctive and can — especially in Persian rugs, one can pretty well identify the — both the community or even the village or tribe that made the rug from the weave.

Q Can you tell us how this rug was made?

A This rug was made on a vertical loom and there are two types of looms. One is horizontal, and this is the type used by nomads and people out in, you might say, the countryside. Most of the village rugs are made on vertical looms which stand upright and the warp strands are strung vertically and then they commence to tie the knots. The knots on this rug are tied, one

knot encompasses two warp strands. This rug is tied with one knot, a Senna knot, but anyway it's — a Persian knot is contrary to a Turkish knot, but it's tied with a Persian knot. Each knot is tied and they're tied all the way across the rug and wet threads woven through the warps, and then they're packed down and the next row is placed and so the rug is built up. It takes a long time to make a rug this complicated and as fine a design as it is.

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Q Can you tell us of what material this is made?

A This rug would be made with cotton warp and wool is pile; I mean, the pile is wool, that's each — the pile is each little knot tied and it stands up. It's the pile of the rug, so that's why you have all these little pieces of wool standing up.

Q Can you tell us how old this rug is?

A This rug was woven probably in the period 1925 to 1930. It's a very classic design of rug. There's no question about that.

Q And how do you know that's so old, how can you tell?

A Because of the design, the period of time, the colors, the dyes that were used, the type of material; by that I mean, over a period of time when you have studied rugs, you'll see that, for example, the warp strands as time goes on have gotten larger because it takes less work to make some of the newer rugs. This

particular rug, the number of strands in it, in the warp strand itself, is composed of so many pieces of twisted material and you'd find that during that period, this is about what they were using. Now, this could have extended into the early '30s, but generally in the early '30s they had chanaged the overall design in Kashan to a different style. Very similar, but different.

Q Can you tell us what the value of this rug is as it stands now without restoration?

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A This rug as it is right today needs restoration. It's what we call in the trade "thin." However, I would value it to a dealer probably in the neighborhood of three to four thousand dollars, depending on the dealer and how he felt about it. It does need some work to put it in market — what I would call marketable condition.

Q Again, back to Exhibit 2, the picture in front of you, did you do an analysis as to whether the picture, the rug in that picture, is indeed this rug?

A Positively. There's no question in my mind that the photograph here, and I could show you if you'd like me to do that —

Q That was going to be my next question: will you please show us how you know these are the same?

A There are several things that you can tell in a rug. First of all, each rug is made individually. Each rug stands on it's [*sic*] own. You may see another rug

that looks exactly like this rug to you but, believe me, there's a difference. The rug could be made off the same cartoon and there's still a difference. They're made with high hucks and each huck will add some difference to it; for example, if we were to take a knot count of this rug from here to the other end, that knot count would be different. There will not be the same number of knots to each square inch in that rug. It will vary, so we take the average. Now, a rug

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grows old just like all of us grow old. We have — time puts wear and tear on us and a rug of that nature has wear and tear on it. It also has the results of time as far as fading and changing; in other words, dyes change over a period of years. This rug has a very noticeable — the first thing that we notice — when I saw the picture — you can practically see it —

THE WITNESS: Can I pass this to the jury?

THE CLERK: I've got to obliterate something.

A You'll notice when you get a chance to see the picture there's also a distinctive line right through here, about an inch, and on the print you'll see that line and you'll know they're just in the same place and everything. Now, that is what's known as an "arbresh." An arbresh can be caused by a number of things. Some romantic Persians sometimes say it's because of family troubles and another that someone

is having a baby or an aunt died, but this is not necessarily true. This, more than often, is caused by a variation in dye lots. A different lot of wool can make — the same dye used on two types of wool can make a difference, whereas in the beginning it looked exactly the same and over the years one lot has changed at a different rate of fading than the other, and so an arbresh results. You'll find this in many, many old rugs. It's not considered to be a defect, so to speak. It's just something naturally that comes from

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a rug growing old. Now, that's very distinct but I also found in this particular rug some other things about it that were absolutely unquestionable to my mind that this is the rug that's in the photograph.

In the course of wear a rug will begin to show little white spots. These little white spots are caused by the wet threads being tied together to the knotted warp strands being knotted; in other words, you don't have one long continuous piece of string, so to speak, so that little knot which doesn't show at all, you know, to begin with in the rug because it's down here buried down in the bottom of all the pretty wool, but as the years go by the wool wears down and knots begin to show through, and so this rug has, I call them "freckles," but it has quite a lot.

Okay. Now, if you examine — if you were to examine this rug here, you would find that they're as distinct, and I found this in the photograph and I have, as a matter of fact, made an enlargement just so it's easier to see, but there are three spots here and there are two spots right there in a distinctive — I mean, they're close in and that's why I tried to find a spot where there were several. Now, it would be impossible for another rug to have those same five spots in it and you can do the same by analyzing other parts of the rug, but I could find that in the photograph that was in the exhibit and you can readily see them with a

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magnifying glass. I'm sure if the photograph were enlarged, you'd be able to see them. I'll pass this around and you can see —

MR. ELLIOTT: No.

MS. JOHNSON: You object?

MR. ELLIOTT: I object to that unless —

THE COURT: Wait a second.

MR. ELLIOTT: I'll object to it unless the Court permits it.

THE COURT: Yes. Hand it to the Clerk and he'll hand it to the jury.

A The only thing about it is you'll see — be able to see the line through there, the arbresh, when you look through the middle, and then the other arbresh, if you have a magnifying glass, you'll be able to see them

right down here, very distinctly. There are five, three by themselves and two in the tentral [*sic*] or vine.

Q (By Ms. Johnson) I'd like to show you what's been marked State's Exhibit 1 and ask if you can identify this?

A Yes. I took this myself in the other room and it shows the five spots.

MS. JOHNSON: Your Honor, I would offer this at this time.

(The exhibit was handed to counsel for the defendant.)

MR. ELLIOTT: I have no objection to it.

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THE COURT: Be received.

(Plaintiff's Exhibit Number 1 was admitted into evidence.)

MS. JOHNSON: May I also have this passed to the jury?

THE COURT: Yes.

MS. JOHNSON: Thank you. I have no further questions of Mr. Ewaldsen.

CROSS EXAMINATION

BY MR. ELLIOTT:

Q Mr. Ewaldsen, we admit your expertise in this field. Are you in any way biased towards Mr. Aryeh in this case?

A Absolutely not, sir.

Q Do you do business with Mr. Aryeh?

A I've done business with Mr. Aryeh for probably seven years, I think. I've bought rugs for Mr. Aryeh and I've sold rugs to Mr. Aryeh in travels throughout the United States as many of us do.

Q How does it come you're up here testifying?

A I was called by the district attorney's office a few days ago and asked if I would like to or had time to come up as an expert witness.

Q Pay your bills up here?

A I believe they are, yes. They've paid my airfare so far.

Q All right, but in fact you're a business associate of

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Aryeh, are you not?

A No, I'm not, no more than I am with any other — as I say, I simply buy and sell. I'm not associated in any way.

Q Mr. Ewaldsen, I didn't ask that. I asked you whether you were a business associate of Benjamin Aryeh?

A No.

Q When did you last sell a rug to him?

A Probably last summer some time.

Q Have you bought any rugs from him lately?

A Yes.

Q When?

A Well, I just — I just sold — I had a few of his rugs on consignment that I just sold.

Q So you had them on consignment from him and you sold them for him, right?

A Yes.

Q Did you pay him for that?

A Yes.

Q So although you're not a business associate, you were doing business with him as recently as two or three weeks ago, weren't you?

A That's true.

Q Now, then, I asked you whether you were biased in this and you said you weren't, right?

A Right.

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Q Mr. Ewaldsen, did you not file or try to file a complaint with the district attorney's office in Medford, Oregon, against Mr. Kennedy a number of years ago because he was a competitor of yours down there?

A No, I did not. Against Mr. Kennedy?

Q Did you file against Mr. or Mrs. Kennedy or their business venture down there?

A No, I did not file. I caused an inquiry to be started.

Q Well, did you file a complaint with the district attorney's office down there in which you charged them with fraudulent advertising?

A I believe we did. It's been a long time ago.

(Counsel approached the witness.)

Q Is that your handwriting?

A Yes, and it's my signature and since you've introduced this, I would like an opportunity to explain it.

Q Well, you —

A In other words, the whole document —

THE COURT: Just a minute. He'll handle the questions, you handle the answers.

Q (By Mr. Elliott) Mr. Ewaldsen, after you went to the district attorney's office and filed this complaint against Mr. and Mrs. Kennedy or their business, nothing came of it, did it?

A No. I never met Mr. Kennedy. I didn't know — I mean,

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I never met him.

Q I didn't ask you whether you met him, Mr. Ewaldsen. I asked whether or not anything came of your complaint filed with the district attorney's office down there?

A The district attorney did not pursue it.

Q Thank you. * * *

[Cross-examination concerning witness's expertise omitted in printing]

* * * * *

[February 28, 1980]

* * * * *

[Further cross-examination and redirect examination concerning witness's expertise omitted in printing]

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* * * * *

MS. JOHNSON: Now, I would ask that the paper that counsel was waving around yesterday be marked as an exhibit, the paper, something about a claim, a consumer complaint, out of Medford in 1972. Counsel produced a paper yesterday and was questioning Mr. Ewaldsen. It should be properly marked as an exhibit, if it is going to be any part of this trial. I would ask that they produce it at this time.

MR. ELLIOTT: Are you asking me to produce it?

MS. JOHNSON: That's right.

MR. ELLIOTT: Great. Excuse me, Karon, I put it in a — here we are. I believe I gave you these three sheets.

MS. JOHNSON: Thank you.

Q (By Ms. Johnson) Mr. Ewaldsen, in 1972, did you know Bruce Kennedy?

A No. I've never met Mr. Kennedy.

Q Even today?

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A Then or today. As of this moment, I have never formally met the man.

Q In 1972, did you file a consumer complaint against one of the Kennedys?

A We filed a complaint against the firm that was displaying rugs at the Red Lion Motel and ran some ads in the paper and I believe the firm was owned by Mrs. Kennedy.

Q I would like to show you what's been marked State's Exhibit 11. It's only a copy. Will you tell us if that is a copy of the consumer complaint that you filed?

(The document was handed to the witness.)

A It looks to me like a copy. It has my signature and it is.

MS. JOHNSON: Your Honor, I would offer Exhibit 11 at this time.

MR. ELLIOTT: No objection.

THE COURT: Be received.

(Plaintiff's Exhibit Number 11 was admitted into evidence.)

(By Ms. Johnson) Why did you do that, Mr. Ewaldsen?

A Well, at the time when the ads were run in the newspaper, we felt they were misleading in that they made certain statements that —

MR. ELLIOTT: Just a moment. I'll object to that as hearsay, unless he can produce the advertising or authenticate —

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THE COURT: I think we're getting way off —

MS. JOHNSON: The Court promised yesterday he could explain what he tried to explain yesterday, why he filed this complaint and Mr. Elliott cut him off and the Court said you would let me go into this matter on redirect, and that's what I'm trying to do. Now, it goes to allegedly a bias against the Kennedys, and I think he's entitled to explain why he did what he did.

THE COURT: Yes, he is, but if he's going to begin quoting something that is not in evidence of what someone else said, a third party, at that time we're getting way off on hearsay, how he — general impression, but without attempting to offer something that's not in evidence and would be what some third party stated.

Q (By Ms. Johnson) Did you read an ad in the newspaper about another dealer's show down there?

MR. ELLIOTT: I'll object to this. She's calling for a conclusion of the witness. How does he know what other people —

MS. JOHNSON: Did he read an ad in the newspaper. That was my question.

MR. ELLIOTT: I don't object to that question.

THE COURT: All right.

A Yes, I did.

Q (By Ms. Johnson) And where was this show? Did you go

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to the show?

A I did not personally go to the show because I was not available to go to the show.

Q Did you have — excuse me. Did you have personal knowledge of the rugs that were being — the source of rugs that were being shown at that show?

A Yes. The rugs came from the Kennedy — Mrs. Kennedy was there with them.

Q And did you know from your own personal knowledge where she had gotten those rugs?

A I don't know exactly where she got them. She undoubtedly got them —

MR. ELLIOTT: Just a moment. I'll object to that.

THE COURT: You're surmising. All right. Unless you personally know.

Q (By Ms. Johnson) She alleged that they had been personally brought from Iran by her?

A She had said that to a number of people that came that she had went —

MR. ELLIOTT: I object to that.

THE COURT: That will be stricken. That's pure hearsay.

Q (By Ms. Johnson) Did you know the advertisement to be false?

MR. ELLIOTT: I didn't hear that question.

Q (By Ms. Johnson) Did you know the advertisement to be

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false?

A We believed it to be false.

MR. ELLIOTT: I object to that. He's not being responsive to the lawyer's questions.

THE COURT: The question is did you believe the advertisement to be false.

MR. ELLIOTT: Well, she said: did you know it to be false.

Q (By Ms. Johnson) Did you believe it to be false?

A We believed it to be false, the part that certainly had misleading statements.

THE COURT: That will be stricken.

MR. ELLIOTT: I'm going to ask that this witness' testimony be stricken in this particular line entirely. He keeps volunteering and he's infecting the testimony with innuendo. I would ask that it be entirely stricken and the jury asked to disregard it.

THE COURT: The last part I'll ask the jury to disregard, his beliefs and so on. All right. Go ahead.

Q (By Ms. Johnson) Were your concerns about the truth of that advertising the sole reason you filed this complaint?

A That's the sole reason. In those days, the county district attorney's office in the various counties had just started the consumer protection —

MR. ELLIOTT: I'll object —

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THE COURT: It will be stricken.

MR. ELLIOTT: — to the answer.

THE COURT: Just don't volunteer. Just answer the questions.

Q (By Ms. Johnson) And was your complaint in the nature of a consumer protection complaint?

A Pardon?

Q Was your complaint in the nature of a consumer protection complaint?

A Yes.

Q Did it involve any business dealings with the Kennedys that you personally were having?

A No. I have never had a business dealing with the Kennedy firm.

Q Now, have you dealt on a business basis with Aryeh?

A Yes, I have.

Q What is the nature of your business dealings with him?

A Ordinary commercial transactions of the type done in the oriental rug business all the time.

Q With how many other dealers do you do the same kinds of transactions?

MR. ELLIOTT: I'll object. It's completely irrelevant.

THE COURT: Well, I think the amount involved would be relevant. All right. You may answer.

Q (By Ms. Johnson) How many other dealers would you deal

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with on the same basis?

A A great many. We have — there's a common practice, they come through all the time looking for old rugs, so we sell rugs to them, we buy rugs for them, we have clients for rugs that they may have.

Q Have you ever done business with the Kennedys?

A No, I have not.

Q Is that because he is a crook?

MR. ELLIOTT: Your Honor, I have a matter for the Court. I would ask that the jury be excused.

THE COURT: We'll have a brief recess.

(The jury left the courtroom at 10:31 a.m.)

THE COURT: Would you, Mr. Petersen, would you read that last question.

(The question appearing on line 8 was read by the court reporter.)

MS. JOHNSON: I asked the question and he answered it. Mr. Elliott is the one who brought all this up. He asked the witness whether he was biased against the Kennedys because he did business with Mr. Aryeh and never even asked him in fact whether he did business with the Kennedys and why. I think the jury is entitled to know because it's in evidence that he does business with Aryeh and all kinds of

other rugs dealers and yet he does not do business with Mr. Kennedy. This directly goes to the business that Mr. Elliott brought up in

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the first place. I think the jury is entitled to know why Mr. Ewaldsen does not do business with the Kennedys.

THE COURT: I think that — go ahead.

MR. ELLIOTT: Your Honor, this witness has said under oath and on this stand that he has done no business with Mr. Kennedy. We have 12 jurors here. We're dealing with the facts. The defendant in this case is indicted on the charge of theft which is a moral offense. Counsel has deliberately placed in the mouth of this witness an opportunity to assert that the defendant in this case is a crook and on that ground that this jury cannot, after that expression by the deputy district attorney, cannot hear and truly try without prejudice against this defendant and the charges that he faces in this court. He is charged with being a crook. This man, if he had said, "I had dealings over the years with this fellow," the question then would not be appropriate but it would have at least been in better taste than it is now, and I move that there be a mistrial and this case reset for trial and this jury discharged, and I have never made a motion on which I felt more serious.

THE COURT: Granted.

MS. JOHNSON: Do I understand this case will be set in the normal course?

MR. ELLIOTT: It will be set when I'm ready to try it.

MS. JOHNSON: Your Honor —

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THE COURT: Did you want to make something more for the record?

MR. ELLIOTT: She wants to argue for the record.

THE COURT: I've already made my decision.

Mr. ELLIOTT: All right. Thank you.

MS. JOHNSON: Your Honor, I don't understand the basis for the Court's ruling.

MR. ELLIOTT: She's arguing. The Court already made a ruling in the case.

MS. JOHNSON: That's why I asked the Court —

THE COURT: I think it's totally out of line, your question of saying — it got right to the heart of it. You asked the question. If he had blurted it out without a question on your part, it would be something else possibly.

MS. JOHNSON: Your Honor, why is this not relevant?

THE COURT: Your question saying, "The reason I won't" — "The reason you wouldn't do business with him is because he's a crook?" That was your question, wasn't it?

MS. JOHNSON: That's right, because Mr. Elliott brought all this up. He attacked — Mr. Elliott is the one who said, "Aren't you biased against the defendant?" He's the one who said, "Well, you do business with Aryeh, don't you, and you're a business associate of his, aren't you?" I never brought up any dealings that Mr. Ewaldsen had with either of these parties other than on my direct examination I asked him

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to make an identification on the rug. It's Mr. Elliott who brought up all that and once having done so and having called this man's business into question by the business dealings that he did with Eastern parties, if any, I think he's entitled to explain, and it's not improper in any way to ask who he deals with and why and —

MR. ELLIOTT: If counsel —

MS. JOHNSON: I'm not finished.

MR. ELLIOTT: If counsel is not content with the ruling, she should file an appeal on the case. I would ask to be excused from this argument. The Court has already ruled on this matter.

MS. JOHNSON: May I finish?

THE COURT: I'll permit her to finish.

MS. JOHNSON: I don't understand why, in view of his questions, and that's the only reason it was asked, in view of his questions, Mr. Elliott's questions, why is it improper to allow the witness to answer that ques-

tion? As I said, I didn't bring this up in my case in chief. It was Mr. Elliott.

THE COURT: Well, but I think your question is — in an effort to rehabilitate him, you certainly are entitled to get some of that in but I think your question went beyond that. Your question, I feel, Miss Johnson, was highly prejudicial; got right to the heart of it and that it was just uncalled for. I think you went one line beyond, and what you're

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telling the jury by your question is just exactly what the issue is right here, that he pulled a fast deal. It's relevant to the guy's business he's engaged so I think the effect of that is to put in the jury's mind that the man's a crook and therefore he must have done this whether he's guilty of the charge or not.

MS. JOHNSON: Is it the Court's position, then, I could have asked: "Why did you not do business with Mr. Kennedy," because that's what the answer would have been —

THE COURT: Well, that would have been —

MS. JOHNSON: -- and we're back right where we were.

THE COURT: You went one step beyond.

MS. JOHNSON: Before the jury comes back, I would ask to withdraw that question and go the route that the Court suggests and let me ask Mr. Ewaldsen:

"Why do you not do business with the Kennedys"? Now, the Court has held that would be a proper question. Is that all right, because it's going to be exactly the same and we'll be right where we are now but —

THE COURT: I feel that that was prejudicial. Now, if Mr. Elliott wants to withdraw his motion, we would continue, but in absence of that, the Court feels that you have gone beyond —

MR. ELLIOTT: Thank you, Your Honor. I repeat my motion. All right. Thank you.

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(There was a discussion relative to withdrawing the exhibits and they were withdrawn.)

(Court adjourned at 10:40 a.m.)

ORDER ALLOWING MOTION FOR MISTRIAL

[Filed March 5, 1980]

[Caption omitted in printing]

On February 27, 1980, this matter came before the court for trial of the above defendant on the charge of THEFT IN THE FIRST DEGREE, before the Honorable Phillip J. Roth, plaintiff appearing by Karon V. Johnson, Deputy District Attorney, and defendant appearing with his attorney, Charles V. Elliott.

A jury was duly empaneled and sworn, and during the presentation of the State's case, defense counsel moved for a mistrial, and the court having fully considered said motion and being fully advised in the premises,

IT IS ORDERED that defendant's motion for the declaration of a mistrial is hereby allowed and a mistrial is declared.

IT IS FURTHER ORDERED that the jury be discharged from further consideration of this case, and that the State's exhibits entered in evidence be released to the Office of the District Attorney.

IT IS FURTHER ORDERED that the within case be continued for trial to a later date yet to be determined.

Stenographic notes of this proceeding were made by the official court reporter, Bob Petersen.

/s/ Phillip J. Roth
PHILLIP J. ROTH, Judge

DEFENDANT'S MOTION TO DISMISS

[Dated March 17, 1980; filed March 19, 1980]
[Caption omitted in printing]

Defendant moves for an Order of Dismissal of the Indictment on the ground that Defendant was previously required by the State to stand trial on this charge on the days of 27 and 28 February 1980.

A jury was empaneled, sworn; and three witnesses were called by the State, and each testified against the Defendant.

On re-direct examination of the third State's witness, the prosecutor, in presence of the jury, asked a leading question of the witness which was intended to brand the defendant in explicit terms to be "a crook".

Defendant moved for a mistrial which was summarily granted by the trial Judge, Hon. Phillip J. Roth.

Under State and Federal case law, to try Defendant a second time on this charge shall violate federal and state constitutional provisions.

[Points and authorities, signature, and attached portions of transcript omitted in printing]

HEARING ON MOTION TO DISMISS

[Caption omitted in printing]

[March 17, 1980]

[2]

THE COURT: In the matter of State of Oregon vs. Kennedy, there has been filed now a Motion for Dismissal, which we will dispose of at this time. This being the defendant's motion, you may proceed.

MR. ELLIOTT: Thank you, Judge Murchison. Your Honor, the motion handed to the Deputy District Attorney and to the Court is a recitation of the incident which occurred during a prior trial of this Indictment. The defendant was in Court under the Indictment on the 27th and 28th days of February last month.

As the Motion states — and I am talking principally for the record — the jury was empaneled, sworn, and three witnesses were called by the State, and each testified against this defendant. When the third witness was called — his name is Otto Ewaldson [*sic*, throughout] — he was under direct examination by the Deputy District Attorney for some time and was then cross-examined by Counsel for the defendant. During the cross-examination of Mr. Ewaldson and in part of the direct examination, he asserted that certain things existed — and I invite the Court's attention to the fact that the next remarks by the witness taken directly from the transcript of the trial are all

part and parcel of the stage setting which resulted eventually

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in an improper question asked by the State and which we charge as a statement that is, in substance, prosecutorial overreaching or misconduct.

The questions that set the stage for the final interrogation of the witness, in effect, establish the fact that this witness, Mr. Ewaldson, did not know Mr. Kennedy. He did not know Mr. Kennedy, nor was he in any way involved in business dealings with the Kennedys.

In other words, the Kennedys were strangers to him. It was after this had been established that the State asked a question which resulted in a motion for a mistrial. For the record and for Your Honor's enlightenment, I am reading from page 66 of the transcript, and the important parts of it have to do with questions intended by the defendant to impeach the witness. He has previously asserted that he had no bias nor prejudice against the defendant, and he was then asked whether he had filed a complaint with the District Attorney's office against the defendant, his wife or the defendant's company, and he said, "Yes;" that he had filed such a complaint.

This, despite his earlier assertion that he was not biased — he stated that his complaint was in the nature of a consumer protection complaint.

Then, I asked him, "Did it involve any business dealings with the Kennedys that you personally were having?"

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And his truthful answer was, "No. I have never had a business dealing with the Kennedy firm."

"QUESTION: Now, have you dealt on a business basis with Aryeh?" Aryeh was a gentleman who is, in effect, the principal witness for the State.

He answered to that : "Yes, I have."

That, again, asserts the circumstance of bias because he has, in effect, taken the witness down to testify on behalf of the State's principal complainant, Mr. Aryeh. He said that he had dealt with him on a business basis.

I then asked him, "What is the nature of your business dealings?" Then, he said, "Ordinary commercial transactions of the type done in the Oriental rug business all the time," establishing a community of interest between this witness and Aryeh, the complainant.

"QUESTION: How many other dealers do you do the same kinds of transactions — with how many other dealers do you do the same kind of transactions?" These are all questions by the State. I have misspoke myself when I said I asked those questions. They were asked by Ms. Johnson, the Deputy District

Attorney. Then, I objected, saying that it was irrelevant, and the Judge overruled that objection and told him to answer.

Then, Ms. Johnson said, "How many other dealers would you deal with on the same basis?" He answered, "A

[5]

great many. We have — there is a common practice. They come through all the time looking for old rugs. So, we sell rugs to them. We buy rugs for them. We have clients for rugs that they may have."

Then, she asks again: "Have you ever done business with the Kennedys?" Then, this is a most important question. He says, "No, I have not." She said, "Is that because he is a crook?"

Immediately, I asked that the jury be excused. The Court excused the jury, asked the reporter to read the question, and Ms. Johnson then proceeded to state her views on this matter, and there was an — an exchange of argument between Ms. Johnson and the Court and defense counsel, and the Court, in one word, simply said, "Granted." So, my motion for a mistrial at that time was immediately granted.

Subsequently, Mrs. Johnson availed herself of an opportunity to be heard on the motion, despite the fact that the Judge had ruled, and I have no criticism of Mrs. Johnson for that. The Judge, as is stated in our

motion, told Mrs. Johnson — and it is patent in the transcript — that she had overstepped the line and had gone beyond reasonableness. If the Court was adjourned and we left to await any further proceedings, that might be had. Now, the law which is the principal interest to

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this Court is patently clear. I won't read the Constitutional provision. This Court has long been on the bench and well understands that the Federal and State Constitutions established the rule that one may not be twice put in jeopardy for the same offense. The Fourteenth Amendment is binding upon the State to the effect that such — that the State must pass no law to invade the rights of this defendant in any measure at all.

The principal cases are set forth in the Defendant's Memorandum, and, for the record, I ask the Court's forbearance in quoting from 8 — *United States vs. Jorn,* [400 U.S. 470], which is a 1971 case, which, in ffect, asserts the proposition that the State should not be permitted to make repeated attempts to convict an individual for the same offense; thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. That's a hard line rule from the *Jorn* case. There is an assertion in a 1949 Federal case, *Wade v. Hunter,* [336 U.S. 684], quoted in our Motion, which

asserts the proposition that the defendant has a valued right to have his trial completed by a particular tribunal, once the trial has been commenced.

Now, we're aware of the proposition that if it is the act of the defendant that interrupts the trial with a motion that the trial be aborted, the defendant cannot under

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ordinary circumstances be heard on a plea of double jeopardy if he is again brought in for trial. However, there is one point and remarkable exception to that rule that the State in a case that was decided in 1976 in the Fifth Circuit, [*United Staes v. Kessler,* 530 F.2d 1246], a rehearing was denied in this case, and that states the rule that it is the — that the present law, Your Honor, where prosecutorial overreaching occurs so that defendant's mistrial request does not remove constitutional double jeopardy barrier to retrial, the government must have through gross negligence or intentional misconduct caused aggravated circumstances to develop which seriously prejudiced the defendant, causing him to reasonably conclude that tainted proceedings would result in conviction.

Now, Your Honor, at the time that the question was asked — and I refer to the question, "You didn't do business with him, although you didn't know him, you didn't do business with him because he's a crook?" —

in the first place, that is a leading question. It is improper on direct examination — entirely improper. The answer is suggested by the question itself.

When that question was asked, this case had gone very well for the defendant. At that point, we were entitled to go ahead with that trial, but the use of this question before a jury of twelve people. So, in effect, all of the evidence that we were faced with — we could either live

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with the improper question of the Deputy District Attorney, identifying the defendant in the case as a crook, or we had to move for a mistrial. We elected quickly to move for a mistrial, and we invited Your Honor's attention to the fact that the Judge did not long ponder this. The Judge immediately, Judge Roth, who has been on the bench for years, immediately declared a mistrial.

There is an Oregon case, *State v. Jackson,* [33 Or. App. 139, 575 P.2d 1001], decided in the Court of Appeals in 1978, where circumstances leading up to mistrial reveal the prosecution's conduct as being intentional, overreaching or in bad faith, reprosecution is improper. This statement by the State will fall into any of those categories. We could, as defendants, not be spent [*sic*] in any way to come back in and be tried in another Court, nor could we proceed with this trial

in view of the — the gravely improper question proposed by the State.

We claim that this was intentional. It is certainly overreaching. If it wasn't any of those, it was certainly bad faith, and we're bou..d by *State v. Jackson,* which is a case that was decided the year before last. It has not been overruled.

The Judge then, in concluding the trial, said, "I think it is totally out of line. Your question or saying" — then, he says, "It got right to the heart of it." This man was brought in, charged under a moral issue. He's

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charged with an Indictment for Theft I, and at that point in time, there was an attempt by the State to declare before the jury had all of the evidence the proposition that this man was a crook. At that point, Your Honor, the transcript is clear — there was no evidence that he was a crook. So, it was either a hip shot or grossly negligent.

The Judge then said, "You asked the question, and remember this assertion that this defendant was a crook did not come from the mouth of Otto Ewaldson, the witness. It came out of the mouth of the Deputy District Attorney."

We ask that this Indictment be dismissed and this man sent back to his business.

MS. JOHNSON: Your Honor, I think — I have never had one of these motions, but I think, although

appropriate procedure is for me to take the stand — I would ask to be sworn at this time.

[10]

KARON V. JOHNSON,

was thereupon called as a witness in behalf of the State, and, having been first duly sworn, testified as follows:

THE CLERK: Your full name, please.

THE WITNESS: Karon; K-a-r-o-n; Johnson; J-o-h-n-s-o-n. It's not Mrs. Johnson; alas, I'm divorced. It is Ms. Johnson.

MR. ELLIOTT: Your Honor, I have respect for the legal abilities of the prosecutor and before she testifies, I would request that the Court establish for the record the procedural question here, whether she has a right to take the stand under oath and to testify about this — this record speaks for itself. I have had double jeopardy motions before, and they have been heard on argument of counsel for both sides, and the Court has made its decision here and in the State of California. I don't know of anything in our procedural rules that permits a witness — a lawyer for either side to get up on the witness stand and testify unless this is a procedure that Your Honor approves, and I object to it.

THE COURT: The normal procedure in handling these motions, is to do it by a means of

argument, and the Court generally accepts the statements of Counsel as representatives of an officer of the Court.

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However, I know of no rule which would prohibit either party from calling a sworn witness to testify about reference to the substance of a motion if they wish to do so. In this case, the District Attorney has indicated that she wishes to call herself as a witness and if she wishes to proceed in that fashion, I would approve the procedure. So, you may proceed.

MS. JOHNSON: Your Honor, I wish to testify that my — that my question in no way constitutes an intentional move for a mistrial. I want to put that on the record why I asked that question. The evening terminated when we were still in the cross-examination of Mr. Ewaldson. Counsel has sought to impeach Mr. Ewaldson, as I understand it, by implying he had a bias in favor of the victim in this case.

The case involves a theft of a Persian rug; that he had a bias in favor of the witness because he had done business dealings with the victim, Mr. Benjamin Aryeh. I noticed in listening to the cross-examination that he never asked my expert whether or not he had any dealings with Mr. Kennedy. So, after we recessed for the evening, I talked

to Mr. Ewaldson out in the hall, and I asked him, "Do you have or have you done any business dealings with the Kennedys?" And his answer was, "No."

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MR. ELLIOTT: I will object to that. That is absolutely nothing but hearsay. If she has knowledge within herself to testify under oath, she shall do it, but I object to her getting up there and bringing in some third-party statements.

THE COURT: Objection overruled. That — the substance of that is already in the transcript which you have furnished to the Court. So, you may proceed.

MS. JOHNSON: And I asked Mr. Ewaldson, "Why don't you do business with the Kennedys?" And his answer was more nicely phrased than my question the next day. His answer was something to the effect that Mr. Kennedy did not meet the standards of professional conduct that he expected in the people that he did business with. And I asked Mr. Ewaldson at that point, "You mean you don't think he's honest or honest in his business dealings?" And Mr. Ewaldson indicated that he did not think he was. At that point, I thought, well, Mr. Elliott brought all this up. I think I'm entitled to ask Mr. Ewaldson if he does business with the Kennedys, and why not? That was the reason that I

asked the question the next day because I thought it was relevant, and I had no intention to cause a mistrial in any way, and I indeed objected to it. That's what I wanted to supplement

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the record with.

THE COURT: Very well. Do you wish to cross-examine?

MR. ELLIOTT: Yes, I do, Your Honor.

CROSS-EXAMINATION

BY MR. ELLIOTT:

Q You say that your question that you asked was not intentional, Ms. Johnson?

A No. I say I did not intend to cause a mistrial.

Q You practiced law for some time; have you not?

A Three years.

Q All right. Do you understand that either counsel calling a witness on direct examination is denied the right to ask leading questions?

A As a general rule.

Q Well, What is the — what is the exception?

A The exception is if the witness is hostile.

Q Was your witness hostile?

A No. No, I don't dispute it. I should not have asked a leading question. I don't dispute that.

Q So, you admit that question was leading; was it not?

A Yes, it was leading.

Q And the answer to the question was suggested by the question itself; was it not? That's why it was leading? And the answer that you solicited was that this man would affirm

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your statement that Mr. Kennedy was a crook; isn't that what you intended?

A And, indeed, he would have.

Q Then, it was intentional; was it not?

A The question was intentional. I'm testifying that I did not intend to cause a mistrial in the case. That was the farthest thing from my mind. That's my testimony.

Q Ms. Johnson, you understand that in order for double jeopardy to attach, it isn't required by the decisions, is it, that the person asking the question must intend that he establish grounds for a mistrial? That isn't a factor; is it?

A On the contrary, it goes right to the heart of the thing.

Q No. You are not answering my questions.

A I disagree with you.

Q It isn't necessary that the question be intended to cause a mistrial? It can be an improper question and still not be intended to cause a mistrial; right?

A No.

Q Now, then, when you went out in the hall, you obtained information which resulted in your questioning of Mr. Ewaldson on your direct examination?

A On my redirect.

Q Excuse me. On your redirect examination, and those

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questions were to establish the fact of whether or not he knew Mr. Kennedy at all; right?

A No.

Q Well, will you — you asked it in the transcript. Do you deny that?

A I thought that he did not personally know Mr. Kennedy.

Q All right. You knew that he didn't know Kennedy?

A Right.

Q If you still — but you still invited him to call Kennedy a crook, although you knew he did not know Kennedy?

A He didn't — he told me that he had —

Q Answer that question.

A I can't the way you phrase it. He told me he had no business dealings with the Kennedys and the reason he did not. I didn't understand that to mean that because a man doesn't personally know someone by face, it doesn't mean that they don't have business

dealings with them. You can correspond with someone all over the country.

Q Ms. Johnson, let me ask you this: You established by your redirect examination that he didn't have business dealings with him; didn't you?

A That's right.

Q And that he didn't know Mr. Kennedy? Do you want me to read it from the transcript?

A Well, I can't remember what he said. I know that he

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did not personally know Mr. Kennedy. He knew of Mr. Kennedy and, indeed, the Kennedys — he had filed a consumer complaint against Mrs. Kennedy for fraudulent advertising down in Medford in '72. So, I knew he knew of the Kennedys. He knew of the Persian Rug Gallery. He did not personally deal with them because of their professional standards, and that's what I was trying to elicit.

Q I'm reading from page 66 of the transcript, and this is a copy of the testimony in the case that was prepared by —

A Bob Petersen.

Q Who is the reporter for Judge Roth. You can talk about the nature of a consumer protection complaint, and I don't want any innuendo that that complaint was valid, because later it was dropped; was it not?

A I don't know.

Q All right. Well, that will come out in the trial if there is one. "Was your complaint in the nature of a consumer protection complaint?" Now, this is a question you asked of your own witness.

A That sounds familiar.

Q He said, "Yes." Then, on page 66, the next question: "Did it involve any business dealings with the Kennedys that you personally were having?" His answer was, "No." Then he embellished his answer and said, "I have never had a business dealing with the Kennedy firm."

[17]

A Yes.

Q Okay. All right. Then, on page 67, you are back with another question which really set up the question we consider, Ms. Johnson, to be improper: "Have you ever done business with the Kennedys?" He came back again and said, "No, I have not." Then, you said, "Is that because he is a crook?" That is your leading question, the one to which we objected?

A Right.

Q Now, you have testified for us that you went out in the corridor and you talked to Mr. Ewaldson?

A Uh-hum (affirmative).

Q And you said he answered that he did not meet Mr. Kennedy, the defendant — this is your answer verbatim just now, he does not meet the standards of

professional conduct that he, meaning Mr. Ewaldson, expected. Now, did you ask him what those standards were?

A No.

Q You didn't interrogate him on the witness stand about, first, what standards he recognized as important; did you?

A No.

Q You simply assigned an identity to this man as a crook, and he's a defendant in a courtroom?

A I know why — I know why I didn't ask him because I — do you want to know why I didn't ask him about his professional

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standards?

Q No.

A I didn't think so.

Q Isn't it fair to say that it's your duty and mine in a courtroom and, particularly, the duty of a prosecutor, which I have been and Judge Murchison has been — it's our duty to protect the defendant from improper innuendos as well as it is to bring every reasonable fact of evidence to the jury in an effort to convict him?

A I have an ethical duty not to do anything that is improper. That is true.

MR. ELLIOTT: That's all the questions I have of this witness.

MS. JOHNSON: May I explain the answer?

THE COURT: You may.

MS. JOHNSON: Mr. Elliott asked why I did not go into more detail on what Mr. Ewaldson meant by professional standards. By then, I talked to enough people. I had enough ideas about the way the Kennedys did business and about the methods that they used and some of the things Mr. Ewaldson had personally been in contact with that I didn't feel it was necessary to go into it any further. I thought I understood what he meant.

MR. ELLIOTT: She's testifying and — she isn't

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testifying about this motion at all.

MS. JOHNSON: I have nothing further.

THE COURT: Well, it's an explanation to the question you asked. If that concludes the record, you may step down.

Any argument — further argument?

MR. ELLIOTT: No, not for the defendant.

MS. JOHNSON: The defense has correctly stated the law as set out in Oregon under *State v. Jackson*; that if the defendant moves for a mistrial, it is particularly deemed to be waived unless the mistrial has been caused by the intentional misconduct, bad faith or overreaching by the State. This *Jackson* case is a — corollary of the U. S. opinion which is in the same vein, *U. S. v. Dinitz*, [424 U.S. 600]. It is a 1975 [*sic*] case, and it pretty well sets out the problems. There is

no evidence that the State intended to cause a mistrial. The defendant moved for it. The State vigorously objected. Judge Roth left the bench immediately. I went into chambers to pull him out and asked him to take the bench so that I could change his mind.

If the Court looks through the transcript, you will see that Judge Roth, who sat on the case, made no finding that the mistrial had been caused by intentional misconduct or by bad faith or overreaching by the

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State. No such findings were made by the trial court and, in fact, I had asked the Court whether it was the substance or the form of my question that was improper, and the Court seemed to indicate that it was not the substance of the question. It was the form that was improper, and, indeed, I don't dispute it. I should not have phrased it the way I did.

It is the State's position that a mistrial should not have been declared in the first place. I ask leave of the Court to reask my question to simply ask Mr. Ewaldson, "Why don't you do business in the Persian Rug Gallery?" Nevertheless, the Court granted a mistrial, but there is no findings to support the motion in this case that it was done intentionally.

MR. ELLIOTT: Your Honor, I want to be heard on that. In the first place, it isn't the province of that Court at that time on the motion to make any findings

like that. The Judge immediately said, "Granted." One word. I invite the Court's attention to the following: She has admitted that it is overreaching because she did not discuss with her witness, Ewaldson, the fact that the defendant was a crook. She said he made a statement that Mr. Kennedy did not meet the standards of professional conduct that the witness expected. What would be wrong with the question, Your

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Honor, if she said, "Do you have an opinion whether or not Mr. Kennedy meets the standards of conduct in this particular business that you would expect?" What's wrong with that question? And his answer would have said, "Yes, I have an opinion." Then, she would ask him what it is. He puts — she put him on the witness stand as an expert, and we concede that he is an expert, but this investigation by Ms. Johnson as to this man's reason and his response to her — it is an admission on the State's part that he said he doesn't meet the standards of professional conduct. Your Honor, does that vest the State with the right to come in and challenge this man through a witness that he is a crook and the use of the term "crook"? Had she gone out and talked to Mr. Ewaldson and he said that this guy is a crook, and I will tell you why — he didn't say that. But, she contrived when she asked the question to paint this man with that brush, and the form of that question

does not excuse the use of the word "crook". She simply overstepped the bounds, and we submit that this case is not — not worthy of retrial, and the Indictment here should be dismissed. This man is put to thousands of dollars that he has spent. He has been harrassed. [*sic*] We will have testimony if the case goes to trial of this

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harrassment [*sic*] this man has faced since the first trial and this — the harrassment [*sic*] in the business, and it is — I have never in my life made a motion about which I am more sincere before this Court or any other Court in which I have practiced law.

If there is a case for double jeopardy or form of jeopardy, as the case may be, this is it, and we cannot — Your Honor must be willing to excuse this conduct by the State if you deny this motion.

THE COURT: Well, Counsel, I assume that Counsel appearing before the Court are always sincere in their motions. The issue before the Court is whether or not the conduct in this matter was intentional, overreaching or in bad faith, and as the Court has reviewed the portion of the transcript which you have attached to your motion and has listened to your explanation of the circumstances of how this matter arose, it seems apparent that the objectional statement was made in the course of an attempt to clarify matters which had been brought out on cross-

examination, and this, of course, is a proper function of redirect examination.

I have reviewed the transcript and the wording, as put, and I would agree that the question was improper as put. I do not find, however, that it constitutes

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bad faith or was intentional impropriety. The question of whether or not it constitutes overreaching is one of those gray areas where we have to determine what "overreaching" means, and in looking to the case which the defense has cited, *United States v. Kessler,* prosecutorial overreaching is there defined as being such as must have been a result of gross negligence or intentional misconduct which prejudiced the defendant so that he cannot receive a fair trial, and I wouldn't find that the overreaching or the erroneous conduct in this matter reaches that degree of aggravation. I don't think it amounted to gross negligence or intentional misconduct.

The Motion for Mistrial will be denied. The Motion for Dismissal of the Indictment will be denied, and we will proceed to trial.

* * * * *

OPINION OF OREGON COURT OF APPEALS

[Opinion set forth in full as Appendix A, pages 12-16 of the printed petition for certiorari]

ORDER OF OREGON SUPREME COURT DENYING REVIEW

[Order set forth in full as Appendix B, page 17 of the printed petition for certiorari]

JUDGMENT AND MANDATE OF OREGON COURT OF APPEALS

STATE OF OREGON
COURT OF APPEALS

STATE OF OREGON, Respondent,	)	JUDGMENT and MANDATE
	)	Appeal from
v.	)	MULTNOMAH County
	)	Circuit Court
BRUCE ALAN KENNEDY, Appellant.	)	No. C79-12-34399
	)	CA 17729

This cause having come on to be heard on appeal and having been duly submitted and considered, and petition for review having been denied by the Supreme Court on March 4, 1981,

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below in this cause is reversed.

The cause is returned below for entry of judgment pursuant to law and the opinion and order of the court entered November 24, 1980.

IT IS FURTHER ORDERED tha appellant recover from respondent costs and disbursements in this court taxed at $75, to be paid in the first instance by Multnomah County.

ISSUED at Salem, Oregon: MAR 16 1981

[Verification omitted in printing]

NO. 80-1991

Office-Supreme Court, U.S.
FILED
AUG 5 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE STATE OF OREGON,

Petitioner,

v.

BRUCE ALAN KENNEDY,

Respondent.

On Petition for Writ of Certiorari
To the Court of Appeals
Of the State of Oregon

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment protects the defendant from retrial when the prosecutor intentionally asked a highly prejudicial question that provoked a mistrial?

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IN THE
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OCTOBER TERM, 1980

THE STATE OF OREGON,

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On Petition for Writ of Certiorari
To the Court of Appeals
Of the State of Oregon

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

Respondent accepts the Petitioner's statement of the case as pointing up the double jeopardy issue of prosecutorial conduct.

ARGUMENT

A. OREGON COURT OF APPEALS STANDARD OF PROSECUTORIAL CONDUCT.

The Oregon court has properly applied the rule enunciated in United States v. Dinitz, 424 U.S. 600, 611:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor' . . .threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."

The court applied the above standard and this rule was reaffirmed in Arizona v. Washington, 434 U.S. 507, 508, where the court stated:

> "Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resource of the State to harass or to achieve a tactical advantage over the accused."

If the rule isn't applied with the "strictest scrutiny" then we must apply a subjective standard of the prosecutor and that would lead the court and the bar into an impossible maze of confusion.

The Petitioner, in its Statement of Facts,page 4, stated that the prosecutor vigorously objected to the mistrial. This is a serious example of the lack of sensitivity of the prosecutor to defendant's having a fair trial and the lack of appreciation of the gravity of the situation.

The defendant is protected by the fundamental constitutional guarantee that he cannot twice be placed in jeopardy for the same offense.

This guarantee does not apply when there is a breakdown of the judicial machinery or where the defendant moves for a mistrial through no intentional misconduct of the prosecutor.

The unwarranted and intentional remarks of the prosecutor tainted the entire proceedings and cannot be tolerated.

The fundamental is well spoken in Green v. United States, 355 U.S 184, 187-188 (1957) where the Court emphasized the underlying proposition "is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The defendant then has a valued right to go before a particular tribunal and take his chances (Perez Doctrine) United States v. Perez, 22 U.S. (9 Wheat) 579, 580 (1824).

The question then reduces itself to the proposition, "if the prosecutor intentionally and under gross circumstances

taints the whole proceeding and the defendant is forced to move a mistrial, except him from the constitutional guarantee?" We think not.

See United States v. Tateo, 377 U.S. 463, 468 (1964) - where defendant's mistrial motion necessitated by prosecutorial impropriety designed to avoid an acquittal, re-prosecution might well be barred.

In United States v. Jorn, 400 U.S. 470, p. 488, in the dissent of Justices Stewart, White and Blockmann,they analyze some of the ground rules in United States v. Tateo, supra, United States v. Perez, supra, and others, and on p. 492, "The real question is whether there has been 'an abuse' of the trial process resulting in prejudice to the accused by way of harassment or the like, such as to outweigh society's interest in the punishment of a crime."

The cases cited within that dissent often lump judicial and prosecutorial error

in the same sentence. Judicial abuse of discretion in aborting the trial is an obvious basis for double jeopardy but equally as disasterous and prejudicial to defendant is the intentional prosecutorial error that was invited by the harmful and unnecessary loaded question that is involved in this case. This absolutely prevented defendant from carrying on with the first jury. Why the prosecutor chose these words may be subjective, but the obvious result is very objective. Was it a jury the prosecutor didn't like? Was the State's witness unconvincing? Were there other factors not known to anyone but the prosecutor why it was unfavorable to carry on with this trial?

If gross error can be no bar, then the rule has little significance to the defendant.

There is a wide gap between an inadvertence that the prosecutor couldn't prevent and no bar would result for a retrial.

The objectionable words here were not uttered by a witness, but were the intentional and spoken words of the prosecutor.

While each case has to be decided in the particular facts, there appears to be two time-tried fundamentals:

(1) Double Jeopardy Clause is to protect the defendant from continued exposure to embarrassment, anxiety, expense and restrictions on his liberty and his valued right to have his trial completed by a particular jury. United States v. Jorn, supra, 484.

(2) Society's interest that a criminal defendant be punished for his infractions.

Defendant-respondent plainly falls into the first category. He had continued exposure to:

(a) Embarrassment

(b) Anxiety

(c) Expense

(d) Restrictions on his liberty

(e) His valued right to conclude the first trial. Who deprived him his rights? The prosecutor.

Does this objective outweigh the public interest? See United States v. Kessler, 530 F2d 1246 (1976) p. 1253-54. "The underlying idea,one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.

The court goes on to say that ordinarily a defendant's request for a mistrial removes any constitutional barrier to retrial, continuing on p. 1255, "But the Supreme Court recognizes that there may be exceptions to that rule - rare cases involving circumstances which are 'attributable to prosecutorial overreaching'" (Citing Jorn, supra, 400 U.S. 485). Where "prosecutorial overreaching" exists, a defendant's mistrial request does not improve the constitutional double jeopardy barrier to a retrial. In such a case, the mere fact that the defendant requested a mistrial is not controlling.

Where "prosecutorial overreaching" is present, the interest protected by the Double Jeopardy Clause, outweighs the public's interest in conducting a second trial ending in acquittal or conviction. Giglio v. U.S., 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed 2d 104 (1972).

This safeguard against "prosecutorial overreaching" provided defendant by the Fifth Amendment Double Jeopardy Clause, complements the "inestimable safeguard against the .....overzealous prosecutor," provided by a jury trial.

The court in the above cited Kessler case held that it was intentional misconduct in introducing certain hearsay evidence regarding a rifle and conspiracy and that such conduct was a bar to retrial regardless of defendant's motion for mistrial. See Divans v. Calif., 434 U.S. 1303, 54 L. Ed.2d 14, 98 S. Ct. 1.

The purpose of the Double Jeopardy Clause is to discourage the abusive and awesome power of the state.

Defendant has a valued right to a fair trial and to proceed with the original tribunal, United States v. Jorn, supra, and State v. Embry, 19 Or. App. 934, 940 (1974).

To have a fair trial requires fairness on the part of the court, prosecutor and defense counsel. Each must uphold that responsibility. The granting of a mistrial is a drastic remedy to be avoided, State v. Embry, supra p. 941. If the defense counsel is unfair and it results in a "manifest necessity" to abort the proceedings, defendant cannot object, but if the prosecutor is guilty of such conduct, he has seriously interfered with defendant's "valued right" and the constitutional barrier applies. If it were otherwise, the state could get away with abusive tactics and the only penalty would be a retrial. Such practice does not serve the Bill of Rights.

Oregon recognizes the distinction between the prosecution's intentional misconduct and overreaching. In State v. Jackson, 33 Or. App. 139, the court stated: "From our examination of the circumstances

leading up to mistrial, we can find no basis for characterizing the prosecution's conduct as intentional misconduct, bad faith or overreaching, or for ordering dismissal with prejudice." Cf. United States v. Dinitz, 424 U.S. 600. In the above cited case, the prosecutor attempted to avoid the problem. In our case, the words were intentionally framed on the prosecutor's lips and the following colloquy by prosecutor and witness occurred:

Q. "Have you ever done business with the Kennedys?"

A. "No, I have not."

Q. (By prosecutor) "Is that because he is a crook?" Tr. (J. Roth p. 67). The court believed it was prejudicial. Tr. (J. Roth). There was no inadvertence; no overzealous witness, but the plain intentionally and obviously abusive and highly prejudicial statement uttered by the prosecutor.

Petitioner cites Tabbs v. State, 403 A.2d 796 (Md. 1979). The facts of that case are clearly distinguishable from the damaging utterance in this case. The Tabbs case involved a damaging blurting out by a state's witness. No intent on the part of the prosecutor -- perhaps negligence in not advising the witness against such behavior. Here, the remark was intentional and clearly not in the area of negligence.

B. NO CONFLICT AS TO LAW AND FACTS.

Petitioner suggests that there is a conflict among the various jurisdictions. The Dinitz, supra, rule is not in conflict.

If petitioner's argument were successful, then the test would be a subjective test of the prosecutor's intentions. This would lead to confusion.

The petitioner cites no case where the prosecutor's conduct is similar to the present

facts. An examination of the cases points more to the area of gross negligence or conduct that does not measure up to the severity of the utterance here that placed the defendant in an impossible situation.

The rule is well established in U.S. v. Jorn, 400 U.S. 470, at 485, where "prosecutorial overreaching" exists, a defendant's request for mistrial does not remove the constitutional protection of double jeopardy.

To make the test subjective where objective conduct is present would seriously damage the constitutional protection of double jeopardy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Oregon Court of Appeals was clearly

correct and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Donald C. Walker
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No. 80-1991

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF OREGON,

Petitioner,

v.

BRUCE ALAN KENNEDY,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment bar retrial of a criminal defendant when a mistrial is declared on the defendant's motion, based upon a prosecutor's improperly-phrased question, which is prejudicial to the defendant, but which is asked in good faith and without intent to provoke a mistrial?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Oregon Court of Appeals reversing defendant's conviction (Petition for Certiorari, at 12-16) is reported at 49 Or. App. 415, 619 P.2d 948 (1980). The order of the Oregon Supreme Court denying the State's petition for review of the court of appeals' decision (Petition for Certiorari, at 17) is officially reported at 290 Or. 551 (1981). It is not reported unofficially in the National Reporter System.

JURISDICTION

The decision of the Oregon Court of Appeals was entered on November 24, 1980. The Oregon Supreme Court denied a timely petition for discretionary review on March 4, 1981. The State's petition for a writ of certiorari was filed on May 4, 1981, within the 60-day period prescribed by Rule 20.1. The Court's jurisdiction is based on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No Person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

United States Constitution, Amendment XIV, § 1:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Defendant Kennedy was charged, in the Circuit Court for Multnomah County, Oregon, with theft in the first degree. The charge was predicated on the theory that he misappropriated a Kashan Persian rug, valued at several thousand dollars, which he had purchased for his business associate, Benjamin Aryeh, using funds provided by Aryeh. (J.A. 2; Tr. 5-10).[1]

Trial began on February 27, 1980. A jury was empaneled; opening statements were made; and two witnesses were called by the State to identify two exhibits: a photograph defendant had sent Aryeh, depicting a rug he had allegedly purchased for Aryeh, and a rug which defendant had told the police was his own. (Tr. 4-20).

The State then called Otto Ewaldsen, an expert on Middle Eastern rugs, who testified that the rug depicted in the photograph defendant had sent Aryeh was the same rug defendant had claimed as his own, and that the value of the rug, in its present condition, was three to four thousand dollars. (J.A. 10; Tr. 28). Defense counsel began his cross-examination of Ewaldsen by inquiring into the witness' possible bias toward the victim, Aryeh, based on their prior business deal-

[1] In this brief, "J.A." refers to the joint appendix; "Tr." refers to the transcript of Kennedy's first trial, which began on February 27, 1980; and "M. Tr." refers to the transcript of the hearing on Kennedy's motion to dismiss, held immediately prior to his second trial, which began on March 17, 1980.

ings. (J.A. 14-16; Tr. 32-33). He then inquired into the possibility that Ewaldsen was biased against defendant, as evidenced by the fact that Ewaldsen had filed a consumer-protection complaint against defendant some years before, which the local district attorney had not pursued:

"Q: [Mr. Elliott]: Mr. Ewaldsen, did you not file or try to file a complaint with the district attorney's office in Medford, Oregon against Mr. Kennedy a number of years ago because he was a competitor of yours down there?

"A: [Mr. Ewaldsen]: No, I did not. Against Mr. Kennedy?

"Q: Did you file against Mr. or Mrs. Kennedy or their business venture down there?

"A: No, I did not file. I caused an inquiry to be started.

"Q: Well, did you file a complaint with the district attorney's office down there in which you charged them with fraudulent advertising?

"A: I believe we did. It's been a long time ago.

"(Counsel approached the witness.)

"Q: Is that your handwriting?

"A: Yes, and it's my signature and since you've introduced this, I would like an opportunity to explain it.

"Q: Well, you —

"A: In other words, the whole document —

"THE COURT: Just a minute. He'll handle the questions, you handle the answers.

"Q: [Mr. Elliott]: Mr. Ewaldsen, after you went to the district attorney's office and filed this complaint against Mr. and Mrs. Kennedy or their business, nothing came of it, did it?

"A: No. I never met Mr. Kennedy. I didn't know — I mean, I never met him.

"Q: I didn't ask you whether you met him, Mr. Ewaldsen. I asked whether or not anything came of your complaint filed with the district attorney's office down there?

"A: The district attorney did not pursue it." (J.A. 16-17; Tr. 34-35).

Later, on redirect examination, the prosecutor attempted to establish that Ewaldsen did not know defendant personally, and had not filed the complaint against him out of bias, but only out of a belief that defendant's advertising was misleading. The trial court sustained a series of objections to this line of questioning by defense counsel. (J.A. 18-23; Tr. 61-66). The Oregon Court of Appeals characterized these objections as "not well taken." (Petition for Certiorari, at 13; 49 Or. App. at 417; 619 P.22d at 949). The prosecutor ultimately asked:

"Q: Have you ever done business with the Kennedys?

"A: No, I have not.

"Q: Is that because he is a crook?" (J.A. 18-23; Tr. 61-66).

Defense counsel immediately moved for a mistrial and a resetting of the case for a new trial. (J.A. 24-25; Tr. 67-68). Over the prosecutor's objection that her question was only intended to explore the issue of bias which had been raised by the defense, the judge granted the motion for mistrial, commenting that he thought that the question was improper in form and

went beyond the limits of proper redirect examination. (J.A. 25-29; Tr. 68-71).

After the court had entered its order allowing defendant's motion for mistrial and ordering the matter reset for trial (J.A. 30), defendant moved for an order dismissing the case on the ground of former jeopardy. (J.A. 31). At the hearing on defendant's motion, the prosecutor testified that she had not asked the question, "Is that because he is a crook?" with the intention of causing a mistrial. On the contrary, her entire line of questioning had been intended to inquire into the subject of the witness' bias toward the theft victim and against defendant, a subject brought up by defense counsel on cross-examination. The prosecutor also testified that her questioning had been influenced by the fact that the witness had told her that he thought the defendant was unprofessional, or less than honest in his business practices. (J.A. 41-43; M. Tr. 11-12). She acknowledged the improper form of the last question she had asked the witness, but argued that her lack of intent to cause a mistrial was evident from the vigor with which she had resisted defendant's motion for mistrial. (J.A. 49-50; M. Tr. 19-20).

The judge to whom defendant's case had been assigned for retrial denied the motion to dismiss, finding for the record that there was no bad faith, intentional impropriety, or gross negligence on the part of the prosecutor, as follows:

". . . The issue before the Court is whether or not the conduct in this matter was intentional, overreaching or in bad faith, and as the Court has reviewed the portion of the transcript which you have attached to your motion and has listened to your explanation of the circumstances of how this matter arose, it seems apparent that the objectionable statement was made in the course of an attempt to clarify matters which had been brought out on cross-examination, and this, of course, is a proper function of redirect examination.

"I have reviewed the transcript and the wording, as put, and I would agree that the question was improper as put. I do not find, however, that it constitutes bad faith or was intentional impropriety. The question of whether or not it constitutes overreaching is one of those gray areas where we have to determine what 'overreaching' means, and in looking to the case which the defense has cited, *United States vs. Kessler,* [530 F.2d 1246 (5th Cir. 1976)], prosecutorial overreaching is there defined as being such as must have been a result of gross negligence or intentional misconduct which prejudiced the defendant so that he cannot receive a fair trial, and I wouldn't find that the overreaching or the erroneous conduct in this matter reaches that degree of aggravation. I don't think it amounted to gross negligence or intentional misconduct.

"The Motion for Mistrial [*sic*] will be denied. The Motion for Dismissal of the Indictment will be denied, and we will proceed to trial." (J.A. 52-53; M. Tr. 22-23).

On defendant's appeal from his subsequent conviction, the Oregon Court of Appeals acknowledged that it was bound by the trial court's findings of fact concerning the prosecutor's intent. Nevertheless the

court characterized the prosecutor's conduct as "flagrant overreaching," charged the prosecutor with the knowledge that her "commenting question" "was certain to interfere with the trial process," and held that defendant's motion to dismiss on the ground of former jeopardy should have been allowed. (Petition for Certiorari, at 14-16; 49 Or. App. at 418-419; 619 P.2d at 949-950).[2]

SUMMARY OF ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, protects against the harassment, embarrassment and risk of successive prosecutions for the same offense. It is not a sanction to be applied for the punishment of prosecutorial or judicial error short of intentional misconduct calculated to cause a mistrial. When a crimi-

[2] It is apparent that the court of appeals based its decision exclusively upon the Double Jeopardy Clause of the United States Constitution. No mention was made of the parallel provision in the Oregon Constitution, Art. I, § 12. The court's opinion relied upon federal decisions except for one Oregon case, *State v. Rathbun*, 37 Or. App. 259, 586 P.2d 1136 (1978), *reversed on other grounds* 287 Or. 421, 600 P.2d 392 (1979). The Court of Appeals cited *Rathbun* as being in "[a]ccord" with the holding of *United States v. Dinitz*, 424 U.S. 600, 611 (1976), that "* * * retrial is barred where the error that prompted the mistrial is intended to provoke a mistrial or is 'motivated by bad faith or undertaken to harass or prejudice' the defendant."

Significantly the court of appeals in *Kennedy* cited to its own opinion in *Rathbun* and noted that it had been *"reversed on other grounds"* by the Oregon Supreme Court. In fact, the court of appeals' version of *Rathbun* relied entirely upon the federal constitutional provision and, as in *Kennedy*, failed to make any mention of the Oregon Constitution. The "other ground" upon which *Rathbun* was reversed by the state supreme court was Or. Const. Art. I, § 12, upon which the court elected to rely, rather than "guess" how this Court would intepret the Fifth Amendment. 287 Or. at 431-432, 600 P.2d at 397. It is therefore obvious that *Kennedy* is grounded solely on the federal constitution.

nal defendant seeks a mistrial because of error which, in the defendant's judgment, has infected the fact-finding process, there is generally deemed to be a waiver of any claim that reprosecution is barred. However, the prosecution should not be permitted deliberately to short-circuit a trial. Regardless of whether such deliberate action is undertaken to harass the defendant through successive prosecutions or to gain a tactical advantage on retrial, it violates the substantive right which is embodied in the jeopardy clause and reprosecution under such circumstances is barred.

This Court has never expressly held that, in this context, jeopardy only attaches when a mistrial is deliberately induced. However, such a rule has been clearly implied whenever this Court has, even incidentally, addressed the problem. Consistent with this Court's decisions, a substantial majority of lower courts have adhered to a rule requiring a showing of purposeful misconduct calculated to force a mistrial.

Although a few lower courts, most notably the United States Court of Appeals for the Fifth Circuit, have held that error caused by the "gross negligence" of the judge or prosecutor can bar a retrial, such a rule is not supported by the history or purpose of the jeopardy clause or by the decisions of this Court. Application of a gross negligence standard leads to a wholly subjective inquiry into minute degrees of blameworthiness of the prosecutor. It thereby converts

the jeopardy clause into a remedy for untoward prosecutorial conduct at the expense of the public's interest in seeing the proper retrial of accused persons proceed to a final determination of guilt or innocence.

Like the gross negligence standard, the standard used by the Oregon Court of Appeals, if adopted as the federal norm, will create disruptive uncertainties in the criminal trial and appeal process. Unlike other areas in which constitutional policies may require application of essentially punitive techniques to counter official misconduct, here there exist fully adequate disciplinary and corrective mechanisms to protect both the rights of defendants and the integrity of court processes.

Moreover, the mistrial occasioned by the prosecutorial conduct examined here did not protect a constitutional value independent of the Double Jeopardy Clause. There might be instances where a prosecutor's improper conduct contravenes fundamental due process rights, by, for example, the prosecutor's improper reference to suppressed evidence or a defendant's failure to testify. But the conduct complained of in this case goes only to non-constitutional issues concerning the form of questions permitted by state law and appropriate procedural techniques for direct and cross-examination.

The question of the prosecutor which prompted the mistrial in this case was admittedly improper in form.

But it was asked in the heat of trial after the prosecutor's legitimate attempt to rehabilitate an impeached witness had been frustrated by erroneous evidentiary rulings by the trial judge. The circuit court which heard the evidence on defendant's jeopardy motion specifically found that the prosecutor was not seeking to cause a mistrial and that her improper question was posed in good faith. These factual findings are amply supported by the record and they are dispositive of this case.

ARGUMENT

A. *Introduction*

It is a general, almost self-evident, rule that a motion by the defendant for mistrial ordinarily removes any barrier to reprosecution, even if the defendant's motion is prompted by prosecutorial or judicial error. *See United States v. Jorn,* 400 U.S. 470, 485 (1971). In *Jorn,* however, the Court suggested that an exception to this general rule exists where the motion is prompted, not merely by prosecutorial or judicial "error," but by prosecutorial or judicial "overreaching." *Id.*

In defining the degree and kind of conduct which constitutes overreaching sufficient to bar reprosecution on double-jeopardy grounds, it is important to note that, as was observed in both the opinion of the Court and the dissenting opinion of Justice Powell in *Crist v. Bretz,* 437 U.S. 28 (1978), the constitutional

guarantee against double jeopardy was derived from the English common law concerning pleas in bar. Originally, application of the doctrine was restricted to cases in which there had been a complete trial, culminating in acquittal or conviction. However, during the 19th and early 20th centuries, the concept of double jeopardy was extended in this country to cases in which the jury was discharged prior to verdict without the consent of the defendant. In a series of decisions, the Court held that jeopardy would apply in this context, in the absence of a "manifest necessity" for aborting the trial, such as inability of the jurors to agree on a verdict, *e.g., United States v. Perez,* 22 U.S. (9 Wheat.) 579 (1824); juror bias, *e.g., Simmons v. United States,* 142 U.S. 148 (1891); juror disqualification, discovered subsequent to empanelment, *e.g., Thompson v. United States,* 155 U.S. 271 (1894); or other procedural deficiencies, *see, e.g., Lovato v. New Mexico,* 242 U.S. 199 (1916).

The exact point at which the law of double jeopardy was extended is unclear;[3] and that question is largely academic, since there can be no doubt at this time that the extension has been accomplished.[4] It is sufficient to note that, because of the extension, under American law, jeopardy attaches when the jury is empaneled

[3] Compare, for example *Crist v. Bretz,* 437 U.S. 28, 34 n. 10 (1978), with the suggestion in *Tabbs v. State,* 43 Md. App. 20, 21-22, 403 A.2d 796, 798 (1979), that the extension was not finally made until *Wade v. Hunter,* 336 U.S. 684, 688 (1949).

[4] *Crist v. Bretz,* footnote 3, *supra,*; *Wade v. Hunter,* footnote 3, *supra.*

and sworn, and not, as in English law, when a verdict is returned. Another consequence of the extension, more critical to the decision in this case, is that a separate, originally unrelated rule of common law has been imported into the law of double jeopardy. That rule, that juries are not to be discharged in the absence of the most compelling reasons therefor, is traceable at least to early Stuart days, when it was invoked to prevent the public prosecutor or a judge sympathetic to the Crown from aborting a criminal trial when an acquittal seemed likely, in order to reprosecute the accused under more favorable circumstances. *See Crist v. Bretz,* 437 U.S. 28, 42-43 (1978) (Powell, J., dissenting); *Arizona v. Washington,* 434 U.S. 497, 507 n. 2[illegible] (1978).

It is understandable, and perhaps even appropriate, that the protection of an accused's "valued right to have his trial completed by a particular tribunal," *Wade v. Hunter,* 336 U.S. 684, 689 (1949), should be subsumed in the Double Jeopardy Clause. Freedom from the harassment, embarrassment, and risk of successive prosecutions for the same offense is, in fact, the substantive right which is embodied in the clause. However, the engrafting of this common law protection gives rise to the need for subtle analytic distinctions. To protect against intentionally aborted trials, it is necessary to focus on the state of mind of the judge and prosecutor. No other aspect of double jeopardy law

calls for such an analysis. Once this leap is made, it is difficult to avoid making value judgments about the conduct which caused the mistrial. Rather than simply inquiring into *why* the act was done, a court finds it necessary to assign responsibility for the act. In this way, jeopardy is transformed from a unique constitutional value into an additional sanction, beyond the mistrial itself, which is imposed as a punishment for prosecutorial misconduct.

The common law rule which was incorporated into the American law of jeopardy was especially intended to prevent the state from manipulating the jury system so as to retry a defendant under more favorable conditions (*e.g.,* before a more sympathetic jury or with a better-prepared case). Moreover, "a provision like that of double jeopardy * * * is rooted in history and is not an evolving concept like that of due process," *Gore v. United States,* 357 U.S. 386, 392 (1958). Petitioner contends that the narrow aspect of double jeopardy law which is implicated in this case should be strictly limited to its original purpose. "Prosecutorial overreaching" should bar reprosecution following the declaration of a mistrial at the defendant's own request *only* when the prosecutor acts with a specific intent to invite or cause a mistrial. In other cases, the remedy of a mistrial is itself sufficient to protect the defendant from the prosecutor's error and to penalize the state for that error. If the defendant avails himself

of that remedy, this act should be deemed a waiver of any claim on his part that reprosecution is barred.

B. *Judicial Application of Double Jeopardy Protection in The Context of Mistrials Caused by Prosecutorial Misconduct*

1. *United States Supreme Court Cases*

This Court has never expressly held that when, because of prosecutorial misconduct, a defendant successfully seeks a mistrial, jeopardy attaches only upon an express finding that the prosecutor intended to short-circuit the trial. Nevertheless, at least since 1949, such a rule has been clearly implied whenever the Court, even incidentally, has addressed the problem.

In *Wade v. Hunter, supra,* this Court applied the Fifth Amendment's double jeopardy provisions to a case in which the original tribunal had been discharged prior to determining the guilt or innocence of the accused. Although acknowledging the applicability of the clause to such situations, Justice Black's majority opinion cautioned:

> "* * * The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed * * *." 336 U.S. at 688-689.

Having acknowledged that the public's interest in "fair trials designed to end in just judgments" would "in some instances" transcend a defendant's "valued right" to have the trial completed by the first tribunal, 336 U.S. at 689, Justice Black applied the manifest necessity rule first announced in *United States v. Perez,* 22 U.S. (9 Wheat.) 579 (1824).[5] Justice Black observed:

> "Under the rule a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue a trial would defeat the ends of justice." 336 U.S. at 690.

Since its decision in *Wade v. Hunter,* this Court has consistently applied the "manifest necessity" standard to cases in which a mistrial occurs upon the Court's own motion or at the request of the prosecution and without the defendant's consent. *Gori v. United States,* 367 U.S. 364 (1961); *Downum v. United States,* 372 U.S. 734 (1963); *United States v. Jorn,* 400 U.S. 470

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[5] In *Perez* the Court upheld a trial judge's discharge of a deadlocked jury without defendant's or the government's consent, as a proper exercise of the court's discretion, observing:

> "* * * We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. * * *" 22 U.S. (9 Wheat.) at 580.

The *Perez* opinion is not only brief, it is barren of any mention of the Double Jeopardy Clause. Nor does it intimate that its recitation of the "manifest necessity" doctrine has constitutional applications. Indeed, this Court has since noted in at least one subsequent case that the decision merely resolved an administrative issue in the federal justice system which was not of constitutional dimension. *Crist v. Bretz,* 437 U.S. 28, 30 n. 10 (1978); *see also* dissenting opinion by Justice Powell, 437 U.S. at 44, nn. 7 and 8.

(1971); *Illinois v. Sommerville,* 410 U.S. 458 (1973); *Arizona v. Washington,* 434 U.S. 497 (1978).

As a general rule, when a mistrial has been obtained at defendant's request, or at least with his consent, this Court has not applied the manifest necessity analysis. Because of the defendant's complicity in the termination of the first trial, double jeopardy has been held not to bar retrial. *United States v. Jorn, supra,* 400 U.S. at 485; *United States v. Dinitz,* 424 U.S. 600, 607-608 (1976); *United States v. Sanford,* 429 U.S. 14, 16 (1976); *Lee v. United States,* 432 U.S. 23, 32-33, (1977); *United States v. Scott,* 437 U.S. 82, 93 (1978); *see United States v. Tateo,* 337 U.S. 463, 467 (1964); *Divans v. California,* 434 U.S. 1303, 1304 (1977) (per Rehnquist, J., in chambers, as Circuit Justice). However, in oft-quoted dicta from its majority opinion in *United States v. Jorn, supra,* this Court recognized the possibility that, under limited circumstances, a defendant's motion for mistrial would not foreclose assertion of double jeopardy as a bar to retrial. The tendency of some lower courts to "penalize" prosecutorial misconduct through application of the double jeopardy bar is traceable to comments in the *Jorn* majority opinion which were unnecessary to the disposition of that case.

In *Jorn,* a federal district court judge, on his own motion and without the consent of defendant or the

government, discharged the jury in the trial of a fraudulent income tax preparation case, because of his belief that prosecution witnesses had been improperly advised of their constitutional privilege against self-incrimination. 400 U.S. at 472-473. The case clearly involved the "manifest necessity" rule as applied to mistrials declared without a defendant's consent; and indeed, the court's analysis proceeded in that vein. 400 U.S. at 479-486. *Jorn* did not involve a mistrial sought at defendant's request. Nonetheless, the Court alluded to the "mistrial at defendant's request" exception to the jeopardy bar in its discussion of the parameters of the "manifest necessity" rule, commenting:

> "Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarly assumed to remove any barrier to reprosecution, *even if defendant's motion is necessitated by prosecutorial or judicial error."* 400 U.S. at 485. (emphasis added).

Thus, the Court clearly distinguished between prosecutorial "error" and prosecutorial "overreaching." Positing the reverse of the above proposition, the Court gave meaning to the distinction and defined overreaching. The Court noted:

> "Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial *impropriety designed to avoid an acquittal,* reprosecution might well be barred. *Cf. United States v. Tateo,*

supra, at 468 n. 3; * * *." 400 U.S. at 485 n. 12. (emphasis added).[6]

In contrast to the situations presented in *Tateo* or *Jorn,* the defendant in *United States v. Dinitz, supra,* had requested and obtained a mistrial. The trial court in *Dinitz* expelled defense counsel from the courtroom following his repeated improper comments during the opening statement to the jury. 424 U.S. at 602-603. The court thereupon gave defendant three options: recessing the case to permit appellate review of defense counsel's expulsion; continuation of the trial with two attorneys assisting in the preparation and trial as counsel; or declaring a mistrial to permit retention of other counsel. 424 U.S. at 604. Following a short recess, defendant, through one of his remaining attorneys, moved for a mistrial as "in his best interest." 424 U.S. at 604-605. The court of appeals, both in panel and later *en banc,* reversed Dinitz' second conviction, finding no manifest necessity for the court's expulsion of original trial counsel. 492 F.2d 53, 54, 504 F.2d 854 (5th Cir. 1974). The court of appeals reasoned that, although Dinitz had moved for a mistrial, the exclusion of his counsel left him no more than

[6]Footnote 3 in *United States v. Tateo, supra,* reads: "If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain." Since *Tateo* involved retrial following a defendant's successful appeal of an involuntary guilty plea, this language, as well as that quoted above in *Jorn,* is clearly dictum.

a "Hobson's choice" and deprived him of his "valued right" to proceed before the first jury.[7] 492 F.2d at 59.

This Court overturned the court of appeals' ruling and specifically repudiated that court's application of traditional waiver concepts to mistrials sought in response to judicial or prosecutorial error, noting:

> "* * * [T]raditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error. [citations]. In such circumstances, the defendant generally does face a "Hobson's choice" between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. *The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.*" 424 U.S. at 609. (emphasis added).

The *Dinitz* Court focused on the function of double jeopardy principles as applied to the mistrial/retrial situation:

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[7] As Judge Charles Moylan observed in his thorough explication of the issue of mistrial/retrial due to prosecutorial error (*Tabbs v. State, supra,* 43 Md. App. at 22, 403 A.2d at 798-799), the "valued right" phraseology first enunciated by Justice Black in *Wade v. Hunter, supra,* 336 U.S. at 689, embarked upon an evolution of its own:

> "*Wade v. Hunter, supra,* refers to it as a defendant's 'valued right to have his trial completed by a particular tribunal.' 336 U.S. at 689, . . . *United States v. Jorn,* 400 U.S. 470, . . . (1971), refers to it variously as a defendant's 'right to go to a particular tribunal,' the right of a defendant not to be 'deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal,' 400 U.S. at 484, . . .; as 'a command to trial judges not to foreclose the defendant's option,' 400 U.S. at 485, . . .; and 'the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate,' 400 U.S. at 486, . . .; *Downum v. United States,* 372 U.S. 734, 736, . . . (1963), refers to it as 'the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him.'"

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor,' *United States v. Jorn, supra,* at 485, * * * threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. *Downum v. United States,* 372 US, at 736, * * *. *See Gori v. United States,* 367 US, at 369, * * *; *United States v. Jorn, supra,* at 489, * * * (Stewart, J., dissenting); *cf. Wade v. Hunter,* 336 US, at 692, * * *." 424 U.S. at 611.

Conceding that the trial judge might have "overreacted" in expelling Dinitz' attorney from the proceedings, the Court nevertheless found no evidence, no contention, nor even a suggestion that "[his] action was motivated by bad faith or undertaken to harass or prejudice" the defendant. 424 U.S. at 611.[8]

In *Lee v. United States,* 432 U.S. 23 (1977), the prosecution determined in mid-trial that the indictment was fatally defective because it lacked an allegation of scienter. Although defendant's motion to dismiss the indictment on those grounds had tentatively been denied prior to trial, it was granted by the court after both sides had rested. This Court concluded that the motion to dismiss was "functionally indistinguish-

[8]Indeed, the Court apparently deemed significant the fact that the record reflected the trial judge's expectation that the trial would continue with one of the supporting attorneys as defense counsel. 424 U.S. at 611 n. 14.

able" from a mistrial request, for purposes of double jeopardy analysis, and noted that the usual means of correcting the error was a fresh start with a new trial:

> ". . . The error, like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided — absent any double jeopardy bar — by beginning anew the prosecution of the defendant." 432 U.S. at 30.

Seeking to delineate which type of error might constitute the prosecutorial overreaching to which the Court had first alluded in *Jorn,* the *Lee* decision stated:

> "It follows under *Dinitz* that there was no double jeopardy barrier to petitioner's retrial *unless the judicial or prosecutorial error that prompted petitioner's motion was 'intended to provoke' the motion or was otherwise 'motivated by bad faith or undertaken to harass or prejudice petitioner* . . . . Here, two underlying errors are alleged: the prosecutor's failure to draft the information properly and the court's denial of the motion to dismiss prior to the attachment of jeopardy. Neither error — even assuming the court's action could be so characterized — was the product of the kind of overreaching outlined in *Dinitz. The drafting error was at most an act of negligence,* as prejudicial to the Government as to the defendant." 432 U.S. at 33-34. (emphasis added).

In *Divans v. California,* 434 U.S. 1303 (1977), the lower courts rejected the defendant's jeopardy claim following a mistrial which was allegedly caused by prosecutorial misconduct. Justice Rehnquist, sitting as a Circuit Justice, denied the accused's request for a stay of his second trial pending filing and disposition

of a petition for a writ of cetiorari. Citing the language of *Jorn, Downum,* and *Dinitz, supra,* the Justice noted that retrials are barred

> "* * * where 'bad-faith conduct by judge or prosecutor,' *United States v. Jorn,* [400 U.S.,] at 485 threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. *Downum v. United States,* 372 U.S., at 736. *United States v. Dinitz,* 424 U.S. 600, 611." 434 U.S. at 1303-1304.

Since the trial court found that the prosecutorial error which had prompted the original mistrial was not "committed * * * for the purpose of forcing the defendant to move for a mistrial," Justice Rehnquist found the jeopardy claim to be patently meritless and denied the stay. *Id.*

In a more recent opinion, this Court addressed the double jeopardy issues raised by the government's statutory right to obtain appellate review of sentences imposed on designated "dangerous special offenders." *United States v. DiFrancesco,* 449 U.S. 117 (1980). While plainly dealing with double jeopardy principles in a post-conviction rather than a mistrial/ retrial context, the Court's analysis in *DiFrancesco* is nevertheless pertinent to this case in several respects.

Cognizant of the current importance and vitality of the Double Jeopardy Clause as exhibited by the multitude of recent cases, the Court noted that its "application has not proved to be facile or routine [as]

demonstrated by acknowledged changes in direction or in emphasis. [citations]." 449 U.S. at 127. The Court drew a clear distinction between those cases in which the first trial has ended in an acquittal, to which the law attaches a particular significance, and affords absolute finality, and those cases in which the trial has not ended in an acquittal, where "[t]he result is definitely otherwise * * *." 449 U.S. at 129-130. With specific reference to the mistrial/retrial context, the Court noted that reprosecution would not be barred, if the mistrial, although obtained without defendant's consent, was occasioned by "manifest necessity" or, if the defendant had "successfully moved for a mistrial * * * *so long as the Government did not deliberately seek to provoke the mistrial request.* [citing *Dinitz, supra*]." 449 U.S. at 130. (emphasis added).

The foregoing discussion clearly demonstrates that, in the context of defendant-requested mistrials, the Court has focused on such error as is "designed to avoid an acquittal" *United States v. Tateo, supra,* 377 U.S. 468 n. 3; *United States v. Jorn, supra,* 400 U.S. 485 n. 12; or "bad-faith conduct" which threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict." *Downum v. United States, supra,* 372 U.S. at 736; *Gori v. United States, supra,* 367 U.S. at 369. Indeed, all of

the decisions in which this Court has, even tangentially, addressed the issue of prosecutorial or judicial impropriety as a possible jeopardy bar to retrial are replete with language branding the requisite error or impropriety as an intentional, deliberate act, consciously designed to provoke a mistrial, to avoid an impending acquittal, to gain a tactical advantage in retrial, or merely to harass or prejudice the defendant by successive prosecutions.[9]

2. *Majority Position — Lower Courts*

The vast majority of federal appellate courts have strictly construed the language of *Jorn* and its progeny in determining what types of improper conduct constitute "prosecutorial or judicial overreaching." Consistent with the clear implication of this Court's decisions, most federal courts require a showing that the offending judge or prosecutor intended to provoke a mistrial as a result of his or her conduct.[10]

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[9] *See, e.g.; "bad-faith* conduct," *United States v. Jorn, supra,* 400 U.S. at 485; "*designed* to avoid an acquittal," *United States v. Tateo, supra,* 377 U.S. at 468 n. 3; *United States v. Jorn, supra,* at 485 n. 12; "*intended* to provoke mistrial requests," "*motivated* by bad-faith or *undertaken* to harass or prejudice," *United States v. Dinitz, supra,* 424 U.S. at 609, 611; "for the *purpose* of forcing defendant to move for a mistrial," *Divans v. California, supra,* 434 U.S. at 1303; "*deliberately seek* to provoke the mistrial request," *United States v. DiFrancesco, supra,* 449 U.S. at 130. (emphasis added). In at least one decision, this Court has declined to bar reprosecution where the prosecutorial error precipitating the mistrial request was "at most an act of negligence." *Lee v. United States, supra,* 432 U.S. at 34.

[10] *See, e.g., United States v. Zozlio,* 617 F.2d 314, 315 (1st Cir. 1980); *Mitchell v. Smith,* 633 F.2d 1009, 1012 (2d Cir. 1980), *cert. den.* — U.S. —, 101 S.Ct. 879 (1981); *Drayton v. Hayes,* 589 F.2d 117, 121 (2d Cir. 1979); *United States v. Estremera,* 531 F.2d 1103, 1110 (2d Cir.), *cert. den.,* 425 U.S. 979 (1976); *United States v. Leppo,* 641 F.2d 149, 152-153 (3d Cir. 1981); *Govt. of*

(Continued on following page)

A clear majority of state appellate courts have similarly adhered to a rule requiring a showing of purposeful misconduct calculated to force a mistrial.[11]

3. *The Fifth Circuit Minority Position*

Although this Court has never suggested that unintentional, but "grossly negligent" misconduct consti-

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(Continued from previous page)

Virgin Islands v. Scuito, 623 F.2d 869, 872-873 (3d Cir. 1980); *United States v. Green*, 636 F.2d 925, 927 (4th Cir. 1980); *United States v. Weaver*, 565 F.2d 129, 133 (8th Cir.), *cert. den.*, 434 U.S. 1074 (1978); *United States v. Roberts*, 640 F.2d 225, 228 (9th Cir. 1981); *United States v. Zimmelman*, 634 F.2d 1237, 1238 (9th Cir. 1981); *United States v. Cox*, 633 F.2d 871, 876 (9th Cir. 1980); *United States v. Calderon*, 618 F.2d 88, 90 (9th Cir. 1980); *Wilkett v. United States*, 655 F.2d 1007, 1011 (10th Cir. 1981); *United States v. Pollack*, 640 F.2d 1152, 1155 (10th Cir. 1981); *United States v. Rios*, 637 F.2d 728, 729-730 (10th Cir. 1980); *United States v. Leonard*, 593 F.2d 951, 954 (10th Cir. 1979).

[11] *See, e.g., Piesik v. State*, 572 P.2d 94, 97 (Alaska 1977); *White v. State*, 523 P.2d 428, 429 (Alaska 1974); *Muller v. State*, 478 P.2d 822, 827 (Alaska 1971); *State v. Way*, — Ariz. —, 631 P.2d 139, 141 (Ariz. App. 1981); *State v. Marquez*, 113 Ariz. 540, 542-543, 558 P.2d 692, 695 (1976); *State v. Wright*, 112 Ariz. 446, 449-450, 543 P.2d 434, 438 (1975); *City of Tucson v. Valencia*, 21 Ariz. App. 148, 152, 517 P.2d 106, 110 (1973); *State v. Ballinger*, 19 Ariz. App. 32, 36, 504 P.2d 955, 959 (1973); *People v. Hathcock*, 8 Cal. 3d 599, 614 n. 14, 105 Cal. Rptr. 540, 550 n. 14, 504 P.2d 476, 486 n. 14 (1973), *overruled on other grounds* in *People v. Green*, 27 Cal. 3d 1, 164 Cal. Rptr. 1,609 P.2d 468 (1980); *People v. Ortiz*, 196 Colo. 438, 440, 586 P.2d 227, 228-229 (1978); *People v. Baca*, 193 Colo. 9, 14-15, 562 P.2d 411, 412 (1977); *Studyvent v. State*, 153 Ga. App. 161, 162, 264 S.E.2d 695, 697 (1980); *State v. Pulawa*, 58 Haw. 377, 382-384, 569 P.2d 900, 905-906 (1977), *cert. den.* 436 U.S. 925 (1978); *People v. Estrada*, 91 Ill. App.3d 228, 236, 414 N.E.2d 512, 517 (1980); *People v. Gomez*, 84 Ill. App.3d 785, 787-788, 406 N.E.2d 886, 888 (1980); *People v. Hill*, 34 Ill. App.3d 193, 197, 339 N.E.2d 405, 408 (1975); *People v. Handley*, 51 Ill.2d 229, 235, 286 N.E.2d 131, 135-136 (1972); *State v. Baylor*, 2 Kan. App. 2d 722, 725, 587 P.2d 343, 346-347 (1978); *State v. Cannon*, 383 So.2d 389, 395-396 (La. 1980); *Lee v. State*, 47 Md. App. 367, —, 423 A.2d 267, 269 (1980); *Bell v. State*, 286 Md. 193, 204-205, 406 A.2d 909, 915 (1979); *Tabbs v. State, supra*, ; *State v. Day*, 94 N.M. 753, 756, 617 P.2d 142, 145 (1980); *State v. Quintana*, 93 N.M. 644, 645, 603 P.2d 1101, 1102 (N.M. App. 1979); *Potenza v. Kane*, 79 App. Div.2d 467, —, 437 N.Y.S. 2d 189, 192 (1981); *State v. Jackson*, 33 Or. App. 139, 143-144, 575 P.2d 1001, 1003 (1978), *cert. den.* 440 U.S. 971 (1979); *Commonwealth v. Potosnak*, — Pa. Super. —, 432 A.2d 1078, 1081-1082 (1981); *Commonwealth v. Starks*, 490 Pa. 336, 341, 416 A.2d 498, 500 (1980); *Commonwealth v. Potter*, 478 Pa. 251, 266, 386 A.2d 918, 926 (1978); *State v. Copening*, 100 Wis.2d 700, 714-715, 303 N.W.2d 821, 829 (1981); *State v. Harrell*, 85 Wis.2d 331, 335, 270 N.W.2d 428, 431 (Wis. App. 1978).

tutes overreaching upon which jeopardy attaches, a small and now diminishing spate of decisions has succumbed to that view. The primary source of this unsupported and aberrant line of authority appears to have been, and to some extent still is, the United States Court of Appeals for the Fifth Circuit.

The phrase "gross negligence" first arose as dictum in the Fifth Circuit's opinion in *United States v. Beasley,* 479 F.2d 1124 (5th Cir.), *cert. den.* 414 U.S. 924 (1973). After holding that no showing of overreaching was made and that, therefore, a retrial was not barred, the court accurately noted that the type of error proscribed is "gross misconduct" designed to "precipitate a mistrial and therby gain 'another more favorable opportunity to convict the accused.' "[12] The court added:

> "* * * At the same time, *Wade v. Hunter, supra,* makes it clear that when a mistrial results from prosecutorial error which does not amount to *gross negligence or* intentional misconduct, the state is not barred from reprosecuting the defendant." 479 F.2d at 1126. (emphasis added).

Reference to Justice Black's opinion in *Wade v. Hunter* discloses no express or even implied allusion to

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[12] "It would be offensive to the fundamental constitutional guarantee against successive, oppressive prosecutions, if the government, at a trial in which its case is going badly, could by *gross misconduct* precipitate a mistrial and thereby gain 'another, more favorable opportunity to convict the accused.' " [citation omitted]. 479 F.2d at 1126. (emphasis added).

the term "gross negligence."[13] Thus, *Beasley's* subtle, yet significant transformation of "gross misconduct" into "gross negligence" was completely unsupported in the decisions of this Court.[14].

Following its *Beasley* decision, the Fifth Circuit reiterated "gross negligence" as a form of overreaching in a subsequent case, which was cited to and considered by the trial court in the case at bar. In *United States v. Kessler,* 530 F.2d 1246 (5th Cir. 1976), the court held:

> "To find 'prosecutorial overreaching,' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.' *United States v. Dinitz* * * *." 530 F.2d at 1256.

Although *Dinitz* is apparently cited in the above passage as authority for the entire postulate, in fact, it only accounts for the final portion. As in *Beasley, supra, Kessler's* reference to gross negligence is

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[13] As Judge Moylan observed, in *Tabbs v. State, supra,* 43 Md. App. at 39-40, 403 A.2d at 407:

> "*Wade v. Hunter,* of course never mentioned 'gross negligence' and was, furthermore, a 'manifest necessity' case where a mistrial was declared by the court *sua sponte* and not an 'overreaching' case where the defense moved for the mistrial."

Referring to the Fifth Circuit's *Beasley* decision, Judge Moylan concluded:

> "That sort of thinking, researching, analyzing and writing is not precedential or persuasive authority for anything."

[14] The confusion evident in *Beasley* regarding this Court's definition of overreaching may have stemmed in part from the comparative dearth of decisions on the subject in 1973. *Jorn* had been decided two years before; *Dinitz, Lee, Divans,* and *DiFrancesco* came, of course, some years later.

created from whole cloth and is unsupported by the history or purpose of the Double Jeopardy Clause as articulated by this Court. Moreover, in *Kessler* as in *Beasley,* the court's discussion of gross negligence is wholly unrelated to the facts which were before the court. The prosecutor in *Kessler* was found intentionally to have elicited hearsay statements of a declarant whom he knew to be unavailable and to have introduced "false" and highly prejudicial evidence. The Fifth Circuit found this error to be *intentional* misconduct sufficient to justify application of a jeopardy bar, thus avoiding application of its own "gross negligence" standard. 530 F.2d at 1257-1258.

The Fifth Circuit has continued to assert its homegrown "gross negligence" standard in mistrial/retrial jeopardy cases. *See, e.g., United States v. Crouch,* 566 F.2d 1311, 1321 (5th Cir.), *reh. den.* 570 F.2d 949 (1978). However, recent decisions suggest that even that circuit may be retreating from its own theory. In *United States v. Garza,* 603 F.2d 578, 580 (5th Cir. 1979), for instance, while paying lip service to its "gross negligence" rule, the court stressed the presence or absence of "bad faith motivation" as the determinative factor in mistrial/retrial prosecutorial error cases and warned that if courts became too eager to find prosecutorial overreaching, the inevitable result would be to inhibit trial judges from granting mistrial motions, even when appropriate. This injection of the

"bad faith" concept in its recent decisions reflects an effort by the Fifth Circuit to temper its own distortion of the theory of jeopardy.

Other state and federal courts which originally adopted and applied the Fifth Circuit's "gross negligence" standard, have since rejected the doctrine and have returned, somewhat chastened, to the fold. The United States Court of Appeals for the Eighth Circuit, for example, applied the gross negligence standard to prosecutorial misconduct in *United States v. Martin,* 561 F.2d 135, 139 (8th Cir. 1977), but later converted, without fanfare, to the intentional "bad-faith" doctrine in *United States v. Weaver,* 565 F.2d 129, 133 (8th Cir. 1978) *cert. den.* 434 U.S. 1074 (1980). And in Pennsylvania, a veritable hotbed of prosecutorial misconduct/jeopardy cases, the state supreme court initially adopted the "gross negligence" rule in a plurality opinion in *Commonwealth v. Bolden,* 472 Pa. 602, 373 A.2d 90 (1977), but then swung back to the intentional misconduct school a year later. *Commonwealth v. Potter,* 478 Pa. 251, 260, 386 A.2d 918, 925-926 (1978). More recent Pennsylvania decisions seem to ensure that the pendulum will not swing back to the "gross negligence" rule. *See, e.g., Commonwealth v. Starks,* 490 Pa. 336, 341, 416 A.2d 498, 500 (1980); *Commonwealth v. Potosnak,* — Pa. Super. —, 432 A.2d 1078, 1081-1082 (1981).

The progressive decline of the "gross negligence"

theory in the jeopardy context is, in no small part, attributable to the utter subjectivity of the fact-finding process which the term necessitates. The concept of gross negligence has been criticized in tort law because it does not describe a *kind* of negligence but rather hints at a *degree* of negligence without defining the scale by which it is to be measured.[15] Because of the vagueness of the term, the Model Penal Code has abandoned any attempt to define it. Model Penal Code (U.L.A.) § 202 (1974). Resort to a "gross negligence" standard for determining whether jeopardy should bar a retrial because of the prosecutor's conduct defeats any effort to promote uniformity and consistency in the treatment of persons accused of crimes. Under this standard, determining whether a retrial is barred turns upon an unstructured judgment about the culpability of the prosecutor. Negligent transgressions which may be "gross" when committed by a seasoned

[15]Dean Prosser describes gross negligence as follows:

"As it originally appeared, this was very great negligence, or the want of even scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous, and struggling to assign some more or less definite point of reference to it, have construed gross negligence as requiring willful misconduct, or recklessness, or such utter lack of all care as will be evidence of either — sometimes on the ground that this must necessarily have been the intent of the legislature. But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind. *There is, in short, no generally accepted meaning*; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or inattention, but less than conscious indifference to consequences and that it is, in other words, merely an extreme departure from the ordinary standard of care." W. Prosser, Handbook of the Law of Torts § 34, at 183-184 (4th ed. 1971) (emphasis added).

veteran, might be perfectly understandable when the prosecutor is a green recruit. Yet the effect upon the defendant is the same in either case. Similarly, conduct which is denounced as "gestapo tactics" by one judge, may be viewed with tolerant understanding by another. The degree to which a prosecutor's conduct prejudices those interests which are protected by the jeopardy clause is not determined by its blameworthiness. Indeed, as a matter of history and constitutional policy, double jeopardy protections were not created as a means of punishing or correcting prosecutorial ineptitude.

Most courts have recoiled from the Fifth Circuit's "gross negligence" standard in apparent recognition of the illegitmacy of its claim to a Supreme Court pedigree. As Judge Orth of the Maryland Court of Appeals cogently observed in *Bell v. State,* 286 Md. 193, 204-205, 406 A.2d 909, 915 (1979):

> "The keystone of the test formulated and consistently followed by the Supreme Court is the requirement of 'intent.' And intent is implicit in 'bad-faith.' Thus, the test does not encompass negligence. *See Illinois vs. Sommerville,* 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973). 'Intentional' and 'negligent' are mutually exclusive. It is true that the greater degree of negligence, the closer the error comes to being intentional. That is, an error by judge or prosecutor which appears to be 'gross negligence' may, of course, provide some evidence

> of intent. But if what seems to be negligent is so gross as to warrant a determination that the act was in fact intentional, it is not then negligent." (footnotes omitted).

Importation of the gross negligence standard to analyze the type of prosecutorial error which triggers double jeopardy protection is unwise, unjust, and constitutionally unwarranted. Because the standard is incapable of generalization into an understandable rule, its adoption would foment litigious appeals rather than resolve them. This Court will be asked to arbitrate, through essentially *ad hoc* jurisprudence, the appropriate degree and category of each separate incident of allegedly negligent prosecutorial or judicial error throughout the United States. To adopt the gross negligence standard would be to breathe new life into a doctrine which has been justifiably discredited for its imprecision and subjectivity in the area of its origin, the common law of torts. The so-called standard would shift the focus of inquiry from the question of prejudicial impact on defendants to the wholly separate and otherwise pointless examination of individual prosecutors' personal trial experiences, tactical choices and developed legal skills. This subject may be an appropriate inquiry of continuing legal education, or of psychoanalysis. It should not, however, be a foundational inquiry for a bedrock principle of constitutional law.

4. *Proposed Rule*

The majority of lower courts have recognized this Court's clear message that jeopardy should attach upon mistrial granted on the defendant's motion, only if there is a specific finding that the conduct of the judge or prosecutor was motivated by an intent to cause a mistrial and thus to subject the defendant to successive prosecutions.[16] It is unimportant whether the intent to short-circuit the trial is prompted by a vindictive desire to harass the defendant or by a calculated determination that a more favorable outcome could be achieved in a second proceeding.[17]

The purpose of the Double Jeopardy Clause is to protect the defendant from successive prosecutions: it is not to punish the prosecutor. The minority of lower

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[16]The apparent confusion evidenced by those courts adopting minority approaches stems in large part from the fact that, until now, the Court has never confronted the issue directly or in detail. Indeed, several courts have lamented the fact that heretofore the only pronouncements addressing the question are, regrettably, succinct, and clearly dicta. *See Tabbs v. State, supra,* 43 Md. App. at 25, 403 A.2d at 800; *State v. Copening, supra,* 100 Wis.2d at 713-714, 303 N.W.2d at 828; *People v. Baca, supra,* 193 Colo. at 13, 562 P.2d at 414; *State v. Day, supra,* 94 N.M. at 757, 617 P2d at 146.

[17]Several decisions by this and other courts have incorporated in their discussion of the prosecutorial overreaching issue a variety of phrases describing the subjective purpose(s) attendant to the prosecutor's misconduct. See, for example, the decisions of this Court cited in footnote 9, *supra.*

Although clearly illustrative of the possible motivations underlying a prosecutor's misconduct, such phrases are not dispositive of the only issue of constitutional consequence: did the prosecutor intend to provoke a mistrial? Intentional provocation of a mistrial, in and of itself, is sufficiently egregious to invoke jeopardy sanctions without delving into a needless psychoanalysis as to *why* the prosecutor intended the mistrial.

Indeed, inclusion of factors descriptive of a prosecutor's motivation in a definition of intent not only complicates and confuses the issue, but unjustifiably requires the accused to prove motive as well as intent. As elsewhere in the criminal law, motive may be probative on the issue of intent, but it should not be a separate element of proof.

courts which have sought to convert the jeopardy clause into a standard for evaluating prosecutorial conduct have failed precisely because the provision was neither designed for, nor is it properly susceptible to, such conversion.

However commendable the deterrent objective of a broader rule may be, the Double Jeopardy Clause was not designed to achieve that goal. Many other devices are readily available to chasten the prosecutor or to remove the taint of prejudicial conduct. In other contexts, such as the Fourth Amendment's prohibition of unreasonable searches and seizures, this Court has grudgingly imposed essentially punitive sanctions, such as the exclusionary rule, because there is no other effective means of ensuring official compliance. There is no similar necessity here.

In the first place, the declaration of a mistrial is itself the last in a range of remedies available to the trial court to cure the effects of prejudicial trial tactics. The court may also admonish the prosecutor or give a curative instruction. The decision as to an appropriate remedy is based upon the risk of prejudice, not the culpability of the prosecutor. If, in addition to the curative declaration of a mistrial, there is a perceived need to discipline the prosecutor, this can be accomplished by expulsion from court or the initiation of bar disciplinary proceedings. The Draconian remedy of dismissing unadjudicated criminal charges

should not be imposed when more direct and less publicly burdensome sanctions are available.

Moreover, under prevailing lower court tests which convert the jeopardy clause into a remedial dismissal mechanism, the sanction is imposed or withheld on the basis of fundamentally unverifiable judgments about the disapprobation which should attach to the prosecutor's conduct. The remedy is addressed to an undefined evil, not to a specific constitutional transgression. For example, in the present case, dismissal was deemed appropriate because the prosecutor "flagrantly" violated an evidentiary rule regulating the form of questions permitted on redirect examination. There is no suggestion that the prosecutor's conduct violated any constitutionally protected right of the defendant. Thus, through an expansive jeopardy analysis, procedural rules may be accorded greater protection than fundamental constitutional rights, if they are violated in a way which offends the subjective judgment of a reviewing court.

If dismissal on double jeopardy grounds is permitted to become an *ad hoc* sanction to be imposed whenever a prosecutor's conduct is deemed sufficiently offensive, the efficiency and fairness of the fact-finding process will be significantly undermined. The harshness of the remedy and its unpredictable application will undoubtedly make trial judges reluctant to grant mistrial motions, even in appropriate cases. This

Court has already specifically acknowledged that dire consequence. *See United States v. Dinitz, supra,* 424 U.S. at 610. The interests of the defendant and the public will thus be impaired by the needless and wasteful process of appeal and reversal. Ironically, an expansive application of jeopardy after mistrial would, in many instances, subject the defendant to more, rather than less litigation. *See United States v. Garza, supra,* 603 F.2d at 587.

Any jeopardy analysis which is predicated upon a subjective inquiry into the prosecutor's motivations will inevitably turn on unanalyzable, and therefore unreviewable epithets such as "gross negligence" or "overreaching." In contrast, determining whether a prosecutor *intended* to cause a mistrial requires only an examination of facts and circumstances. The determination of one's intent must generally be accomplished by inference, but the drawing of such inferences is a practice well known to the criminal law. Facts such as the severity of the prosecutorial misconduct, the point in the trial at which it occurred, the relative success enjoyed by the prosecution and defense up to that point, and the prosecutor's resistance to the mistrial request will all be pertinent to that factual determination. However subtle the inquiry may be, it is one which trial courts are accustomed to making.

This case presents an opportunity for the Court to

state directly and unequivocally that lower court expansions of the jeopardy concept in defendant-requested mistrial settings are inappropriate. The test in this context should be simply whether the prosecutor's conduct was intended to provoke a mistrial. This test avoids needless and hopeless psychoanalysis of prosecutorial motivation, degree of fault or amount of personal blameworthiness and focuses on a clear, determinable issue. In doing so it serves the historical origins and present constitutional rationale for the protection against double jeopardy.

C. *The Oregon Position*

1. *Decisional Law*

Oregon's uniquely errant interpretation of jeopardy principles first surfaced in the state supreme court's decision in *State v. Rathbun,* 287 Or. 421, 600 P.2d 329 (1979).[18] In that case, a mistrial was occasioned by improper remarks made by the court bailiff, in the presence of several jurors, during the trial and subsequent deliberations. Despite its recognition that the mistrial was not "triggered by prosecutorial or judicial desire to harass the defendant or afford the prosecution a more favorable opportunity to

[18] An earlier Oregon Court of Appeals decision, *State v. Jackson,* 33 Or. App. 139, 575 P.2d 1001 (1978), *cert. den.* 440 U.S. 971 (1979), correctly applied the *Dinitz* "bad-faith" or "intentional" standard to the overreaching issue. Notwithstanding defendant Kennedy's reliance on *Jackson* in the trial court (J.A. 38-39; M. Tr. 8), the court of appeals found "no basis for characterizing the prosecutor's conduct [in that case] as intentional misconduct, bad faith or overreaching." 33 Or. App. at 143, 575 P.2d at 1003.

convict," the Oregon Supreme Court held that retrial was nonetheless barred, stating:

> "The misconduct by this bailiff is so abhorrent to the sense of justice that we find the same sanction is required to effectuate the constitutional command as in the case where the prosecutor or the judge intends to provoke a mistrial. The state put this officer of the court in the position to wreak havoc and must bear the same burden as when its prosecutor or judge in like manner offends." 287 Or. at 432-433, 600 P.2d at 398.[19]

The case at bar involves a mistrial occasioned by prosecutorial misconduct in which the lower court found "as a matter of fact [binding on review] that it was not the intention of the prosecutor . . . to cause a mistrial." Petition for Certiorari, at 14; 49 Or. App. at 418; 619 P.2d at 949. In the course of its scant factual and legal analysis, the Oregon Court of Appeals acknowledged the import of this Court's prior declarations in *Jorn* and *Dinitz*:

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[19] Although, as we have already pointed out in footnote 2, *supra*, the supreme court's decision in *Rathbun* was based upon the jeopardy clause of Oregon's Constitution, Or. Const. Art. I, § 12, ("No person shall be put in jeopardy twice for the same offense"), the court's analysis and discussion was drawn almost exclusively from decisions of this Court interpreting the federal Double Jeopardy Clause.

In a subsequent case involving alleged misconduct by a court bailiff, *State v. Williams*, 48 Or. App. 319, 617 P.2d 629 (1980), the Oregon Court of Appeals declined to invoke the double jeopardy bar which was interposed by the state high court in *Rathbun, supra*. Indeed, in 'the court's discussion of the issue, it appeared to endorse the intentional misconduct thrust of *Jorn, Dinitz, et al:*

> "* * * Unlike the conduct in *Rathbun*, here the bailiff's actions were 'attributable to mere negligence.' 287 Or. at 434. The bailiff in the case was *not motivated by bad faith* and her conduct was not akin to 'the case *where the prosecutor or the judge intends to provoked a mistrial.*'" 48 Or. App. at 324, 617 P.2d at 632. (emphasis added).

"The general rule is said to be that the double jeopardy clause does not bar prosecution, '* * * where circumstances develop not attributable to prosecutorial or judicial overreaching, * * * even if defendant's motion is necessitated by a prosecutorial error.' *United States v. Jorn,* 400 US 470, 485, 91 S Ct 547, 27 L Ed2d 543 (1970). However, retrial is barred where the error that prompted the mistrial is intended to provoke a mistrial or is 'motivated by bad faith or undertaken to harass or prejudice' the defendant. *United States v. Dinitz,* 424 US 600, 611, 96 S Ct 1075, 47 L Ed2d 267 (1976). Accord, *State v. Rathbun,* 37 Or App 259, 586 P2d 1136 (1978), *reversed on other grounds,* 287 Or 421, [600] P2d [392] (1979)." Petition for Certiorari, at 14; 49 Or. App. at 417-418, 619 P.2d at 949.

Nevertheless, the Oregon court misapplied the very principles which it espoused, stating:

"* * * [W]e are of the opinion that the prosecutor's conduct in this case meets one of the other forbidden criteria, *viz.,* overreaching. The comment occurred during the redirect examination of a key witness. The prosecutor's express intent was to rehabilitate the witness, who had been impeached. However, the commenting question went beyond rehabilitation and was, in fact, a direct personal attack on the general character of the defendant. As such, *we think the prosecutor is charged with the knowledge that the comment — which we must treat as intentional, at least in the sense that it appears it was made deliberately and after some thought — was certain to interfere with the trial process.*" Petition for Certiorari, at 15; 49 Or. App. at 418; 619 P.2d at 949-950. (emphasis added).

The above passage reflects an almost cavalier

abandonment of the *Jorn/Dinitz* requirement that the prosecutorial misconduct be "intended to provoke a mistrial" or "motivated by bad faith." In its place, the *Kennedy* court substituted a mere showing of knowledge (chargeable to the prosecutor)[20] that the impropriety was "certain to interfere with the trial process." Recognizing that the requisite intent and bad faith motivation which it had disregarded were at the very heart of *Jorn* and its progeny,[21] the *Kennedy* court characterized the prosecutor's misconduct as "intentional, at least in the sense that it *appears* that it was made deliberately and after some thought." *Id.* (emphasis added).

Under the above language in *Kennedy,* a prosecutor's conduct resulting in a mistrial would invoke the double jeopardy bar to retrial merely if the court held the prosecutor chargeable with the knowledge that his or her error was "certain to interfere with the trial process" and if it appeared that the improper action was done "deliberately and after some thought." *Ken-*

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[20]The court did not specify by what means or under what guidelines a prosecutor would be held "chargeable" with such knowledge.

[21]As already pointed out in footnote 9, *supra,* the requirements of misconduct intended to provoke a mistrial or motivated by bad faith have been restated consistently, though in varying forms by the Court. Lower courts adhering to the majority view have stressed the intent or motivation element. For example, in *People v. Baca, supra,* 193 Colo. at 14, 562 P.2d at 414-415, the court noted:

> "Accordingly, while the nature and gravity of the error may be relevant to the motivation of the party committing the error, or may give additional weight to a finding of bad faith the crucial focus must remain upon that motivation."

nedy requires neither that the improper question be motivated by bad faith (indeed, it could be misguided but made in good faith), nor that the prosecutor have intended to cause the mistrial.[22]

The Oregon appellate court's analysis of another aspect of the prosecutorial misconduct/jeopardy issue was equally flawed. Having found the prosecutor chargeable with the knowledge that the comment she deliberately made was "certain to interfere with the trial process," the court concluded:

> "Defendant then was faced with a Hobson's choice — either to accept a necessarily prejudiced jury, or to move for a mistrial and face the prospect of being retried at a later time. There will be many circumstances in which the decision, in the face of this dilemma, to seek a mistrial will be deemed the equivalent of a waiver of a defendant's prior jeopardy rights. *See United States v. Jorn, supra,* 400 US at 485. However, this case of flagrant

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[22]The *Kennedy* rationale goes far beyond the "gross negligence" minority approach in two respects, since well-intentioned but erroneous misconduct susceptible to censure by the Oregon view would hardly comprise "gross negligence," notwithstanding the vagueness of the term, *cf. United States v. Fine,* 644 F.2d 1018, 1022, (5th Cir. 1981); and the court of appeals even expressed uncertainty as to whether the prosecutor's subjective intent "should necessarily play a pivotal role in the decision as to whether or not prior jeopardy forbids retrial." Petition for Certiorari, at 15 n. 1; 49 Or. App. at 418 n. 1; 619 P.2d at 949.

In contrast to the *Kennedy* version of intent necessary to find overreaching is the more common view articulated in *People v. Gomez, supra,* 84 Ill. App.3d at 788, 406 N.E.2d at 888:

> "To obtain the protection of the double jeopardy clause in a case such as this, the intent of the prosecutor in overreaching must be to obtain a premature termination of the proceedings by forcing the defendant to move for a mistrial. Unless the prosecutor's misconduct was a ploy to force the defendant to move for a mistrial, and thereby obtain an opportunity to prosecute the defendant a second time, overreaching to obtain a conviction, although not to be condoned, does not itself foreclose reprosecution."

overreaching lies outside that general rule. The facts require reversal of the defendant's conviction and his discharge on grounds of former jeopardy." Petition for Certiorari, at 15-16; 49 Or. App. at 418-419; 619 P.2d at 950.

The above reference to a "Hobson's choice" is an apparent allusion to this Court's treatment of that aspect of the mistrial/retrial issue in *United States v. Dinitz, supra.* However, in its exposition of the subject in that case, the Court dismissed "traditional waiver concepts" as inapplicable to the jeopardy situation. 424 U.S. at 609. *Dinitz* discounted the "Hobson's choice" analysis as nondispositive, stressing instead the defendant's retention of "primary control over the course to be followed in the event of such error." *Id.*

In sum, *Kennedy's* allusions to the pronouncements of this Court in *Jorn* and *Dinitz* are, at best, superficial. In reality, the decision runs completely afoul of both the history and philosophy underlying jeopardy principles applied to defense requested mistrials occasioned by prosecutorial or judicial error. Moreover, it all too eagerly invokes the Draconian sanction of a bar to retrial even for conduct which was not motivated by bad faith.[23] Finally, while clearly protective

[23]Such a harsh remedy clearly would "undermine rather than further the protection of the Double Jeopardy Clause," *cf. United States v. Dinitz, supra,* 424 U.S. at 610, since, if courts are too quick to find prosecutorial overreaching, the inevitable outcome would be an understandable reluctance by trial judges to grant mistrial motions even in appropriate cases. *Id.* at 610 n. 12. *See also United States v. Garza, supra,* 603 F.2d at 581. The interests of both the defendant and the public would thus be impaired by the needless and wasteful process of appeal and reversal employed as an artifice to avoid any jeopardy sanctions attendant to mistrials. *Cf. United States v. Tateo, supra,* 377 U.S. at 466. See discussion in text at pp. 35-36, *supra.*

of the defendant's "valued right" to the first tribunal, the decision seemingly ignores the "public's interest in fair trials designed to end in just judgments." *Wade v. Hunter, supra,* 336 U.S. at 689.

2. *Application of Law to These Facts*

The Oregon Court of Appeals' holding that retrial of this case was barred on double jeopardy grounds is erroneous by any standard of prosecutorial overreaching which the lower courts of this country had previously derived from the decisions of this Court.

The question which gave rise to defendant's motion for mistrial was clearly not asked with the intent to provoke a mistrial. The trial court so found; the court of appeals acknowledged that it was bound by the trial court's finding; and that finding is amply supported by the record.

Indeed, nothing in the record suggests otherwise. The question was asked early in the trial, during redirect examination of the third witness for the State. Defense counsel asserted, at the hearing on defendant's motion to dismiss, that the case "had gone very well for the defendant" up to the time the question was asked (J.A. 38; M. Tr. 7). However, the only substantive evidence that had been elicited at that point was the unequivocal opinion of the expert witness that a rug which defendant had claimed to own was actually purchased for the theft victim with the victim's money, testimony which hardly redounds to defend-

ant's advantage. The record suggests no obvious discrediting of the expert's qualifications or his opinion on cross-examination; nor does it suggest that the witness displayed a patent bias against defendant, although, of course, the question of bias had been raised. And, incomplete as the trial was, there is certainly nothing in the record to suggest that the prosecution had anything to gain by aborting the trial and starting over at the point when the mistrial was declared. The indicia of intent to cause a mistrial simply are not present here.

Furthermore, the record contains nothing which contradicts the prosecutor's representation that her question, although improper in form, was asked in the heat of trial, in a good faith[24] attempt to rehabilitate a State's witness after defendant had inquired into bias, and in the face of a series of defense objections of questionable merit.[25] Nor is there anything which contradicts her representation that her inappropriate phrasing of the question was simply the logical product of her awareness of what the witness' answer would be. In fact, these representations are corroborated by the vigor with which the prosecutor resisted both defendant's motion for mistrial and his

[24]Though not present here, "bad faith" conduct, in the abstract, is not enough. *Cf. United States v. Rios, supra,* 637 F.2d at 729-730.

[25]Like most states, Oregon holds that a witness who is impeached for bias may be rehabilitated by a showing of the reasons for any bias he may have. *See, e.g., State v. Lee,* 46 Or. 40, 79 P. 577 (1905); *State v. Warren,* 41 Or. 348, 69 P. 679 (1902). For cases of other jurisdictions, see footnote 26, *infra.*

subsequent claim of double jeopardy. The trial court was eminently entitled to find that the prosecutor's question was asked for a legitimate purpose and in good faith. A reviewing court, with only a cold record before it, is in a less satisfactory position to make such judgments; and therefore, in this context, deference to a trial court's findings is particularly appropriate.

To hold that the prosecutorial error here examined triggers a federal constitutional bar to reprosecution impinges adversely and perhaps unwittingly on other important substantive policies. Widely accepted evidentiary practices relating to the impeachment and rehabilitation of witnesses, founded not in the preservation of specific constitutional values but merely in the substantive and procedural criminal law of the states, will not be open to "back door" constitutional attack under the Double Jeopardy Clause.[26] This unwarranted assault on state policies is contrary to the

[26] Evidentiary procedures respecting impeachment and rehabilitation in many jurisdictions clearly permit questions which go well beyond the inquiry disallowed in this case. *See generally* 2 Wharton, Criminal Evidence § 495 (13th ed. 1972); *State v. Patterson*, 284 N.C. 190, 200 S.E.2d 16 (1973); *People v. Burke*, 52 Ill. App.2d 159, 201 N.E.2d 636 (1964); *State v. Crase*, 112 Kan. 486, 212 P. 81 (1923); *Crowell v. State*, 147 Tex. Cr. R. 299, 180 S.W.2d 343 (1944); *Meeker v. State*, 395 N.E.2d 301 (Ind. App. 1979). The federal courts which have considered the question are in accord. *See, e.g., United States v. Brown*, 547 F.2d 438 (8th Cir.), *cert. den.* 430 U.S. 937 (1977); *United States v. Kimbrough*, 528 F.2d 1242 (7th Cir. 1976); *Bracey v. United States*, 142 F.2d 85 (D.C. Cir.), *cert. den.* 322 U.S. 762 (1944); United States v. Panetta, 436 F. Supp. 114 (E.D. Pa. 1977), *aff'd.* 568 F.2d 771 (3d Cir. 1978). A small number of cases disapprove the practice. *See, e.g., Slagle v. State*, 39 Ala. App. 691, 108 So.2d 180 (1959); *Roark v. Commonwealth*, 206 Ky. 618, 268 S.W. 297 (1925); and *People v. Pierce*, 269 Cal. App.2d 193, 75 Cal. Rptr. 257 (1969). *But see, Goody v. City of El Cajon*, 223 Cal. App.2d 259, 35 Cal. Rptr. 896 (1963).

values of federalism and unnecessarily disruptive of the criminal trial process.

In the present case, by defendant's design, the jury was presented with express and implied evidence that the expert witness, Ewaldsen, was biased against defendant. The obvious implication was that the witness could not be trusted. This context explains the prosecutor's hardly uncommon dilemma, the circumstances under which the redirect examination was conducted, and the objective as well as the justification for her entire line of admittedly somewhat inartful questioning.

The prosecutor's question in this case was objectionable only because of its improper form, not because of its wholly permissible objective. No constitutional bar can be urged to the substance of what the witness would have related about the defendant's conduct or character, had a proper question posed the opportunity. Nor can it be questioned that cross examination by defense counsel made the subject relevant in the first instance. Yet under the theory of the court of appeals, the seven word interogatory of the prosecutor became not merely the occasion for a mistrial but a fatal bar to reprosecution altogether. The Double Jeopardy Clause should not be permitted to constitutionalize the intricacies of nonconstitutionally based state evidence law in this manner.

CONCLUSION

It is appropriate and desirable in this case for the Court to hold unequivocally that when a mistrial is granted on defendant's motion because of prosecutorial or judicial error, the Fifth Amendment jeopardy clause does not bar retrial unless the prosecutor's or judge's conduct was undertaken intentionally to provoke a mistrial. However, regardless of what standard this Court chooses to apply, the court of appeals erred in setting aside defendant's conviction on Fifth Amendment jeopardy grounds. The judgment of the Oregon Court of Appeals should be reversed.

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No. 80-1991

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE STATE OF OREGON,

Petitioner,

v.

BRUCE ALAN KENNEDY,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

When the Oregon Court has allowed the double jeopardy bar based upon prosecutorial misconduct and has been sensitive to the Fifth Amendment as incorporated in the Fourteenth Amendment, should the United States Supreme Court monitor the Oregon Court which has measured up to the Oregon and United States Constitutional guidline standards?

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BRIEF FOR RESPONDENT

OPINION BELOW

Petitioner has properly cited the opinion below.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of Oregon, Article I, Bill of Rights, Section 12:

> "No person shall be put in jeopardy twice for the same offense. . ."

United States Constitution, Amendment V:

> "No Person shall ...be subject for the same offense to be twice put in jeopardy of life or limb..."

United States Constitution, Amendment XIV, § 1:

> "...No State shall...deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

The respondent adopts the petitioner's statement of the case as being fairly and accurately stated, with the exception that the

additional information in the court's opinion was to the effect that the court was not bound by the subjective intent of the prosecutor and in the court's opinion (Petition for Certiorari, p. 15):

> "...As such, we think the prosecutor is charged with the knowledge that the comment -- which we must treat as intentional, at least in the sense that it appears it was made deliberately and after some thought -- was certain to interfere with the trial process..."

The court went on, on page 16, to state:

> "...The facts require reversal of the defendant's conviction and his discharge on grounds of former jeopardy."

SUMMARY OF ARGUMENT

1. The facts of this case clearly reveal that the prosecutor intentionally made a highly prejudicial remark that tainted the whole proceedings and that implicit in that intentional statement was bad faith, overreaching and an unfair advantage given to the State and that brings forth all the reasons why the double jeopardy clause was

incorporated both in the State and United States Constitutions.

2. The Oregon Court found on the factual basis that the intentional remark was prosecutorial misconduct and the Oregon Court's findings of fact should not be overturned.

3. The offense in question is against the State of Oregon and should the Oregon Court's opinion be in conflict with any of the federal Circuits' questions in a federal case, that should not be a basis for certiorari as the Oregon Court has lived up to its own Constitutional case law and the Constitutional guidlines set forth in Jorn and Dinitz as upholding the Fourteenth Amendment.

4. The State of Oregon is free to regulate its own procedures and the United States Supreme Court should not correct the State Court in their view of federal Constitutional

questions if they have not offended Fourteenth Amendment guidelines.

5. Even though the Oregon opinion does not refer to its own Constitution, it is obvious that the Court is aware of its own Constitutional basis for double jeopardy and the case law surrounding same. This Court cannot say with certainty that the decision rested solely on federal grounds and not also on state grounds.

6. The Oregon Constitution also provides against double jeopardy and the due process rights of the defendant have been fully protected, and the State has not deprived any due process, but the furthest that this Court should go would be to remand the case to the state Court to clarify the basis of its decision, although it appears obvious that it is sensitive and followed the guidelines of Jorn and Dinitz.

7. The United States Supreme Court should not monitor the Oregon Court on a case by case examination, but only to be certain that the Fourteenth Amendment guidelines have been followed. The Oregon Court has measured up to those guidelines.

Respondent's Argument

The double jeopardy clause is to protect the defendant's right to a single, fair adjudicated trial of his guilt or innocence. United States v. Jenkins, 420 U.S. 358, 370. His right is predicated on a trial that will protect his financial and emotional burden and also reduce the risk that an innocent defendant may be convicted. Arizona v. Washington, 434 U.S. 497, 503-4. Therefore, a defendant has a substantial interest in the decision of whether or not to take a case from the jury. United States v. Jorn, 400 U.S. 470, 485. Jorn also specifies

the exception to the general rule that if defendant's request for mistrial is precipitated by "prosecutorial overreaching," a second trial is barred by the double jeopardy clause. United States v. Dinitz, 424 U.S. 600, 607. "Prosecutorial overreaching" is misconduct intended to "undermine the basic fairness of the first proceeding." United States v. Weaver, 565 F.2d 129, 133 (8th Cir. 1977), United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976). The prosecutor might not have had the specific purpose of provoking defendant's request for a mistrial. United States v. Nelson, 582 F.2d 1246, 1249 (10th Cir. 1978), United States v. Love, 597 F.2d 81, 86 (6th Cir. 1979). This right outweighs the public interest in a second trial.

ANSWER TO PETITIONER'S ARGUMENT

A. Introduction

The general rule is that a mistrial

moved by the defendant removes the barrier for reprosecution. United States v. Jorn, supra. This same case, however, at page 485, states the exceptions, namely that if defendant's motion is prompted by prosecutorial overreaching

The exception to the general rule is just as important as the general rule if the facts warrant it

The facts in this case support the exception:

Comment on Facts

A reading of all the cases cited demonstrates that each case must be decided on its own particular circumstances. Downum v. United States, 372 U.S. 734, 737,

"Each case must turn on its own facts."

Some of the cases talk about negligence, but negligence is not part of this case. The questionable conduct was the act of a professionally trained and experienced deputy district attorney. Her

statements were intentional and her motive ostensibly to obtain an unfair advantage over the defendant.

What her entire motive might have been has to be subjective, but a subjective test cannot be the constitutional test; otherwise the double jeopardy protection would be a mockery.

Therefore, an objective standard has to be applied. What was said? Under what circumstances could such an utterance be anything but highly prejudicial? The answer is, of course, "None." Was such an utterance intentional? Of course it was. We place a heavy burden on bailiffs (State v. Rathbun, 287 Or. 421). Should the burden on a trained lawyer be any less?

Since the unique facts of each case are controlling, let us now look at the record to obtain the real atmosphere of the critical juncture of the trial.

The following points should be considered:

1. The prosecution witness (Ewaldsen) had been doing business with the alleged victim for seven years (JA 15).

2. The prosecution witness had never met the defendant (JA 17, 18, 23, 24).

3. After establishing by her own questions that the prosecution witness did not know, nor had done business with defendant, she then makes the voluntarily and intentionally following statement in the form of a question:

Q. "Have you ever done business with the Kennedys?"

A. "No, I have not."

Q. "Is that because he is a crook?" (JA 24).

The prosecutor had to know that this would abort the trial. No defense counsel could let such a prejudicial statement stand.

5. The Motion for mistrial (JA 24, 25)

6. The court immediately granted the Motion. (The court didn't have to wait -- this indicates that not only the words but the manner, tone and attitude were so detrimental that the decision was quick and decisive).

7. Statement out of line.

Court: "I think it's totally out of line, your question of saying -- it got right to the heart of it. You asked the question. If he had blurted it out without a question on your part, it would be something else possibly." (JA 26)

Court: "...Your question, I feel, Miss Johnson, was highly prejudicial; got right to the heart of it and that it was just uncalled for..." (JA 28)

The Court: "You went one step beyond." (JA 28)

8. Prosecutor argues that the trial should go on and attempts to justify her

detrimental remark. (JA 24,25,26,27,28,29).

9. On retrial the prosecutor is still protesting that her question was proper. (JA 40,21,42). This question was asked when she knew the witness had not done business with defendant. This makes it doubly abhorent.

10. Prosecutor admits the "question - remark" was intentional (JA 44).

11. The questions that need be answered:

(a) Was the remark intentional?

A. Yes.

(b) Was it improper?

A. Yes.

(c) Was it overreaching?

A. Yes.

(d) Was it bad faith?

A. Yes.

(e) Was it obvious that such a remark would lead to a mistrial?

A. Yes.

(f) Should the test be subjective or objective?

A. The latter.

(g) Should the defendant be tried over again in the face of these facts?

A. No.

The petitioner's brief attempts to make an analytical scrutiny and breakdown of a prosecutor's state of mind. They would have the prosecutor's "specific intent" become a subjective test regardless of the outward and objective overreaching statement that forced the defendant into a mistrial. A subjective test would make it impossible to pronounce a rule of law that would give a trial judge a standard to go by without subjecting the Constitutional guarantee to a case by case monitoring by this Court. It would transfer the standard from the objective Constitutional standard to the particular feeling of the trial judge.

The petitioner's suggestion would truly dilute this precious guarantee against double jeopardy.

Petitioner would summarily place this case in the same category where accidental or unforeseen prosecution error results in a mistrial at defendant's request. Many examples are in the cases where such errors occur because of a witness's remarks or the prosecutor's sincere, but overzealousness in closing argument, but this case does not fall in that category.

The prosecutor had "the specific intent" to make the remark that she did.

The consequences also were apparent to her. Can the defendant under these circumstances be told that the prosecutor didn't intend to cause a mistrial? Under what circumstances could a defense counsel not move for a mistrial under these harsh set of facts? The mistrial was a necessity.

The prosecutor's remark was bad faith, and bad faith is the underlying element of overreaching.

The result of the "overreaching" remark without the protection of the double jeopardy guarantee leaves the defendant in a precarious position. They are:

1. Continued exposures to embarrassment.
2. Anxiety.
3. Expense.
4. Restrictions on his liberty, and
5. His valued right to have his first trial completed by a particular jury.

United States v. Dinitz, 424 U.S. 600, 611.

Society's interest, while extremely important, has a constitutional limit and the double jeopardy protection is warranted by the harsh facts of this case.

B. Judicial Application of Double Jeopardy Protection in The Context of Mistrials Caused by Prosecutorial Misconduct.

1. United States Supreme Court Cases

Counsel for respondent does not argue with the petitioner's analyses of the various court decisions. Respondent does disagree with the conclusions of law as they apply to this case. The cases of negligence, oversight, simple error are all understandable, but the facts of this case fall squarely in the language of United States v. Dinitz, supra, at 611:

> "It bars retrials where 'bad faith conduct by judge or prosecutor' ...threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."
>
> Downum v. United States, 372 U.S. 734, 737.

"Each case must turn on its own facts."

The cases of this court are clear that if "bad faith" or "overreaching" by the prosecution are such that a mistrial necessarily results, then all the reasons are present to uphold the double jeopardy protection.

2. Majority Position -- Lower Courts

Each case is dependent on the particular facts. The Oregon Court found the facts to be constitutionally objectionable (Pet. for Cert. 16): "...The facts require reversal..."

The Oregon decision does follow the majority rule. The Court in its opinion (Pet. for Cert. 15) states:

> "...As such, we think the prosecutor is charged with the knowledge that the comment--which we must treat as intentional, at least in the sense that it appears it was made deliberately and after some thought--was certain to interfere with the trial process..."

Respondent would agree that the prosecutor's conduct must appear that there was a "purposeful misconduct calculated to force a mistrial."

It would be difficult to find a more blatant and damaging remark by a prosecutor. For the prosecutor to say she did not intend a mistrial taxes even the credulity of a passerby of our system.

In a criminal slander case, could a defendant excuse himself by saying, "I didn't intend the consequences?"

Prosecutors are trained in the law and an objective standard can be the only valid criteria. The trial judge immediately saw the seriousness of the prosecutor's remark.

3. The Fifth Circuit Minority Position

Analyzing gross negligence cases is going out on a tangent. The Oregon Court of Appeals' opinion is based on the "flagrant overreaching" of the prosecutor. Gross negligence is not part of the decision that is being challenged.

It is interesting to note in petitioner's brief, pp. 30, 31,32, it is argued that a "gross negligence" standard is unrealistic and states, p. 31, "Yet the effect upon the defendant is the same in either case..." (Whether the negligence is by a seasoned or green prosecutor). That same argument can be

made as to the prosecutor's "intent". "The effect upon the defendant is the same."

4. Proposed Rule

The State Court rule is not to be upset because of conflicts among the circuits in federal cases.

Petitioner's "proposed rule" would substantially water down Dinitz and Jorn. No one is attempting to punish the prosecutor. He has a standard to measure up to. The Fourth Amendment cases place a tough standard on the police officer on the front line. Surely the courtroom has more time for reflection than the split second decisions of a police officer on the line.

If the petitioner can excuse the prosecutor in this case, the double jeopardy protection will be set back many years.

C. The Oregon Position

1. Decisional Law

In State v. Jackson, 33 Or. App. 139, the

Oregon Court was confronted with a double jeopardy plea based on conduct of prosecution witness. The court that time did not find bad faith or overreaching or intentional misconduct and the former jeopardy question was fairly resolved. The facts of the case at bar are blatantly more serious than Jackson, and granting the plea was in accord with Jorn and Dinitz.

The petitioner attempts to argue that the Oregon Supreme Court went astray in State v. Rathbun, 287 Or. 421, 600 P.2d 329 (1979) (Misconduct by Bailiff). Not so. The Oregon Supreme Court based its decision on both the Oregon and Federal cases in the case at bar.

The State appears to be very calloused as to the rights of a defendant. The bailiff is part of the court staff and the court found his misconduct "so abhorent to the sense of justice..." The court was applying the constitutional principles laid down in Jorn and

Dinitz.

The petitioner appears to be hung up on the word "intent" and attempts to make a fine distinction between "intent" and "bad faith" or "overreaching".

Three courts in Oregon were of the opinion that the conduct was flagrant to the point that the trial could not continue.

The trial judge said "I think it is totally out of line..." (JA 26) "You went one step beyond." (JA 28)

The Oregon Court of Appeals said "However this case of flagrant overreaching lies outside the general rule. The facts require reversal..." (Pet. for Cert. 15, 16).

The Oregon Supreme Court denied Petition for Review. (Pet. for Cert. 17).

The petitioner, in its brief (p. 31), cites the case of Bell v. State, 286 Md. 193, 204-5:

> "The keystone of the test formulated and consistently followed by the Supreme Court is the requirement of 'intent.' And intent is implicit in 'bad-faith.'..."

To make a hairline distinction between specific intent, bad faith or overreaching would only frustrate the rule. The State selects a trained and experienced prosecutor to prosecute the case. Can the State honestly say she did not intend to say the crucial remarks? She states she talked to the witness out in the hall and had time to reflect before she came back into the courtroom. (JA 42) The petitioner can hardly say it was a "good faith" remark or a harmless remark; it was a flagrantly bad faith remark. If it was bad faith, it was overreaching and squarely within the rule of Jorn, et al.

The petitioner also jumps on the court's language in Kennedy -- "...was certain to interfere with the trial process." It is

clear from the court's opinion that the interference was bad faith conduct and particularly "overreaching." The Kennedy court was correctly following Jorn.

It is interesting to note that the petitioner scantly discusses the parallel double jeopardy provision of the Oregon Constitution, Article I, Section 12. It is true that the opinion discusses the United States Constitution as interpreted in Jorn and Dinitz. The important point is that the Oregon Constitution is not in conflict with the United States Constitution.

The fact that the Oregon Court of Appeals judge does not refer to the Oregon Constitution in no way indicates that he was not aware of such constitutional provision. The Court of Appeals judge realizes he has to satisfy the Fourteenth Amendment standard as guided by the cases.

2. Application of Law to These Facts

The petitioner's brief, p. 43, states, "The question which gave rise to defendant's motion for mistrial was clearly not asked with the intent to provoke a mistrial..."

The real question based on Jorn is "Was it motivated by bad faith or undertaken to harass or prejudice the defendant." The prosecution's remark falls squarely within that criteria.

The petitioner talks about coming in the "back door." (Petitioner's Brief p. 45), "evidentiary practices" and "rehabilitation of witnesses." No trial procedure can rise to the magnitude of a constitutional guarantee. It is the prosecution that is trying to come in the wrong door.

No rationalization can justify or excuse the flagrant overreaching of the prosecutor's remark. It tainted the whole trial and forced the defendant to abort the trial.

ANSWER TO AMICUS CURIAE BRIEF
OF UNITED STATES

RETRIAL ALLOWED UNLESS MISTRIAL PROVOKED

A. The Decision Below is Not Contrary to Consistent Line of Decisions of This Court.

The Solicitor General in his brief would like to persuade this Court that the Oregon Court departed from the rules laid down in Jorn, Dinitz, et al.

Those are landmark cases that set down rules that balance the Constitutional guarantee against double jeopardy and societal interest that guilty parties are convicted.

A review of the cases is commendable, but the Solicitor's analysis fails to emphasize the seriousness of the overreaching that occurred in this case.

Also, it should be remembered that this is a State case and the Oregon Constitution is also involved, Article I, Section 12. This Court's responsibility is to monitor the

Oregon Court to determine whether the Fourteenth Amendment has been violated. If the Oregon Constitution is more sensitive, then that should not be a concern of the Federal Court. This Court's concern is that the Oregon Courts respond to the Fourteenth Amendment standard and not fall short. That has been accomplished.

The Fourteenth Amendment prohibition does not prevent the State from interpreting its own Constitution as long as the Fourteenth Amendment standard is protected.

In our system of dual sovereignty, the responsibility of this Court is not to reverse or modify a result that has been adequately resolved by the State Court.

The Fifth Amendment prohibits the nation from depriving, and the Fourteenth Amendment is a ban on the States. Oregon has protected, not offended, the defendant-respondent's Fourteenth Amendment rights.

STATE STANDARDS RESPECTED

Complete uniformity through the fifty States and the Federal Circuits is an impossibility. Has Oregon measured up to the basic standard is the real question -- not whether it went beyond what the Attorney General of Oregon and the Solicitor General might think the rule should be.

Carter v. Illinois, 329 U.S. 173, at 175:

> "But the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual States. The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures... Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases...."

Page 176:

> "...So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated."

The theory of dual sovereignty constitutionally grants definite powers to the States. The Fourteenth Amendment superimposes a duty upon the States. Carter v. Illinois, supra, page 176:

> "...For the relation of the United States and the courts of the United States to the States and the courts of the States is a very delicate matter..."

Bute v. Illinois, 333 U.S. 640, at 652-653 (1947), sets forth the Federal government-State government relationship, on page 653:

> "Because the Constitution of the United States, during nearly 80 formative years, thus permitted each state to establish, maintain and accustom its people to that state's own form of 'due process of law,' a substantial presumption arises in favor of, rather than against, the lawfulness of those procedures and in favor of their right

> to continued recognition by the Federal Government as 'due process of law.'..."

Oregon has not fallen below the standard that needs correction. The only issue is whether the action by the State Court violated the Fourteenth Amendment. Oregon measured up.

Bute v. Illinois, supra, page 659:

> "It is natural for state procedures to differ from each other in many ways. It is permissible for the states to establish ways of safeguarding the respective interests of the prosecution and of the accused in their courts..."

Brown v. Mississippi, 297 U.S. 278, at 285:

> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'..."

The sound policy behind the rule that State's decision should be respected was well brought out in Herb v. Pitcairn, 324 U.S. 117, 125-126:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power betweeen the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion." Id., at 125-126 (citations omitted.).

See also dissenting opinion of Justice Marshall in Oregon v. Hass, 420 U.S. 714, at 726:

> "In my view, we have too often rushed to correct state courts in their view of federal constitutional questions without sufficiently considering the risk that we will be drawn into rendering a purely advisory opinion..."

and also Justice Brennan, in Michigan v. Mosley, 423 U.S. 96, at p. 120:

> "In light of today's erosion of Miranda standards as a matter of federal constitutional law, it is appropriate to observe that no state is precluded by the decisions from adhering to higher standards under state laws. Each state has power to impose higher standards governing police practices under State law than is required by Federal Constitution."

See also State of Oregon v. Flores, 280 Or. 273, at 279:

> "Although we are bound by the United States Supreme Court's interpretation of the Federal Constitution, we are at liberty to adopt a stricter test under our own constitution." Citing Oregon v. Hass, supra.

THE FOURTEENTH AMENDMENT IN HISTORY

Through the years there has been a continuous conflict among the various justices as to the proposition that the Fourteenth Amendment embodied the Bill of Rights.

In Palko v. Connecticut, 302 U.S. 319 (1937), the Court held that the Fourteenth Amendment did not indulge the protection of the Fifth Amendment against double jeopardy.

Palko, however, was expressly overruled in 1969, Benton v. Maryland, 395 U.S. 784, and the prohibition against double jeopardy was finally incorporated as part of due process. However, this has been a "selective incorporation" by some decisions, but the whole process of "incorporating" was upsetting to Justice Felix Frankfurter and he much preferred the "absorption theory." His test was that the judge or prosecutor must have done something that "shocks the conscience." Rochin v. California, 342 U.S. 165, at 172 (1952).

The end result of the historical development of the Fourteenth Amendment is that the States must measure up to a standard. The Constitutional provision is that "No State can deprive a person of...due process." The State of Oregon has not.

The purpose of the Fourteenth Amendment was not to superimpose the federal Court system upon the States. The admonition and

role of the United States Supreme Court is to monitor the State Courts and to determine whether they have measured up to an accepted standard. The Fourteenth Amendment did not intend the United States Supreme Court to override State Courts where the State decision was "properly rooted in the traditions and conscience of our people as to be ranked as fundamental." Duncan v. Louisiana, 391 U.S. 145. If the Oregon Court is oversensitive, that is no Fourteenth Amendment violation.

ANSWER TO "INTEREST OF UNITED STATES"

The Solicitor General is attempting to use an Oregon decision as a basis for reconciling federal cases in the various Circuits that are in conflict. If this were an offense against the United States, his point would be well taken.

A State case that has not offended the Fourteenth Amendment is not the basis for the United States Supreme Court to straighten

out the rule that might be in conflict in the various Circuits. This is a matter of federal concern and the respondent should not be forced to substantial expense, worry and delay where his case has been carefully decided by the Oregon Court of Appeals, and the Oregon Supreme Court has studiously denied a Petition for Review.

ADDITIONAL CASES

Respondent has already stated that each case has to be decided on its own merits. The United States Supreme Court cannot minutely set a standard that trial and appellate judges in fifty states can adequately apply. The basic constitutional guidelines set forth in Jorn and Dinitz safely protect the individual as contemplated by the Fourteenth Amendment and afford a reasonable yardstick. If that yardstick is not used, then there is a federal question. If the yardstick is used to its full measure, then there is no need

for federal intervention.

See:

United States v. Rich, 589 F.2d 1025, (C.A. 10, 1978)

United States v. Martin, 561 F.2d 135, (C.A. Ark. 1977)

United States v. Wilson, 534 F.2d 76, (C.A. Ky. 1976)

Rochin v. California, 342 U.S. 165, at 168:

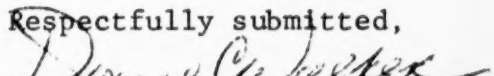
> "Due process of law, 'itself a historical product,'...is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice."

CONCLUSION

The decision of the Oregon Court should not be disturbed. It has thoughtfully measured up to the standard of due process, both as to the United States and Oregon Constitutions.

The Oregon Court should be affirmed.

Respectfully submitted,



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No. 80-1991

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF OREGON,

Petitioner,

v.

BRUCE ALAN KENNEDY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF OREGON

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union Foundation of Oregon, Inc. is a nonprofit organization dedicated to defending civil and constitutional rights. ACLU-Oregon appears as Amicus with the consent of the defendant and the State of Oregon.

CONSTITUTIONAL PROVISIONS

Oregon Constitution article I, section 12:

> No person shall be put in jeopardy twice for the same offence . . . .

United States Constitution amendment V:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

United States Constitution amendment XIV:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

SUMMARY OF ARGUMENT

I.

Because the holding below rests on an adequate state ground, the Court should dismiss the writ of certiorari as improvidently granted.

Alternatively, the Court should decline to decide the federal constitutional questions raised in this case until the Court has permitted the Oregon Court of Appeals to clarify, upon vacation and remand of the judgment, whether the state constitutional double jeopady clause, raised by the defendant below, would adequately and independently dispose of the case.

The judgment of the Oregon Court of Appeals rests in part upon the Oregon court's application of the state's own constitutional double jeopardy guarantee. The opinion itself refers to no federal constitutional text. And, although the decision discusses federal cases interpreting the Fifth Amendment, it also cites State v. Rathbun, 287 Or. 421, 600 P.2d 392, a 1979 Oregon Supreme Court double jeopardy case. Rathbun applied the Oregon Constitution's double jeopardy clause, article I, section 12, to bar a second prosecution in circumstances very similar

to the facts in Kennedy.[1] Particularly when read in light of Oregon's tradition of deciding applicable state law claims before reaching any issue of federal due process, see, e.g., Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981), the opinion sufficiently rests upon an independent and adequate state ground to preclude this Court's review at this time. Accordingly, the writ should either be dismissed, or the case vacated and remanded to the Oregon courts under California v. Krivda, 409 US 33, 35 (1972), for articulation of the basis for the decision.

Dismissal or remand would avoid an erroneous assumption of this Court's jurisdiction. Dismissal or remand would also avoid this Court's rendering what will almost certainly be an advisory opinion. Defendant would entitled be to reassert his state constitutional claims in Oregon regardless of what this Court says about federal

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[1] Alternative grounds for decision are generally considered independent, and not dicta. See United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924). See also Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949).

law. The holding in State v. Rathbun, supra, would likely compel the Oregon Court of Appeals once again to rule for the defendant. This Court could avoid the risk of rendering a purely advisory opinion on the meaning of the federal Fifth Amendment by first remanding the cause back to the Oregon courts for a determination whether the opinion rests on state law, federal law, or both. Only if the judgment for the defendant necessarily rests only on federal law is it appropriate for this Court to exercise its jurisdiction and to express its opinion. Herb v. Pitcairn, 324 U.S. 117, 125 (1945).

Alternatively, the Court should vacate and remand without decision even if the Court determines that the Oregon Court of Appeals did not intend to rest its decision on the Oregon Constitution. Defendant below expressly raised the Oregon double jeopardy clause in his defense. Even assuming arguendo that the Court of Appeals bypassed article I, section 12, of the Oregon Constitution to decide this case, this Court, as a matter of policy, should nevertheless permit the Court of

Appeals and Supreme Court of the State of Oregon to rule expressly on defendant's Oregon constitutional claim before the Court reviews the federal questions which may also be present on the record.

Amicus respectfully submits that this is an appropriate occasion for the Court to adopt a policy of declining to review a state court judgment reversing a conviction involving federal questions until all state law questions which are raised below have in fact been resolved by the state court adversely to the defendant. This rule, suggested by Justices Marshall and Brennan in Oregon v. Hass, 420 U.S. 714, 729 (1975), would diminish unnecessary federal court review of state court decisions, reduce the risk of advisory opinions, avoid jurisdictional puzzles, encourage state courts to assume responsibility for applying their own laws, and help to relieve the heavily burdened Supreme Court docket. Reflecting the federalist principle of respect and comity, this restraint would lead to a measure of decentralized standards in the criminal justice system, and would return to the states a

measure of responsibility for regulating these sensitive relations between government and citizen to the states, subject only to federal minimum standards.

ARGUMENT

I.

BECAUSE THE DECISION BELOW MAY WELL REST ON AN INDEPENDENT AND ADEQUATE STATE GROUND, THE COURT SHOULD DISMISS THE WRIT, OR SHOULD VACATE AND REMAND THE CASE FOR CLARIFICATION BY THE OREGON COURTS.

Since at least 1939,[2] the Supreme Court has followed a practice of dismissing or remanding state cases back to state courts for clarification whenever the Court is in doubt whether the judgment below rested solely and necessarily on federal law grounds.[3] The rule is based on a concern with

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[2] See State Tax Comm'n v. Van Cott, 306 U.S. 511 (1939). See also California v. Krivda, 409 U.S. 33, 35 (1972); Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 196-97 (1965); Herb v. Pitcairn, 324 U.S. 117, 128 (1945); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

[3] The Supreme Court vacated and remanded six such cases for clarification during the October 1980 Term alone. See cases cited in footnote 10 infra.

observing the constitutional division of authority between the state and federal systems, a division which safeguards to the states the right freely to interpret their own statutes and constitutions. And, as Justice Jackson explained in the much-cited Herb v. Pitcairn:

> [W]e cannot perform our duty to refrain from interfering in state law questions and also to review federal ones without making a determination whether the one or the other controls the judgment. And in cases where the answer is not clear to us, it seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended.

324 U.S. 117, 127-28 (1945).

Typically, in doubtful cases, the prevailing party below has relied upon both state and similar federal constitutional guarantees. The ambiguity arises when the state court renders an apparent constitutional holding, but does not clearly specify whether the court intends to rely solely upon an independent state ground, solely upon a federal ground, or upon both.[4] Under these

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[4] Delaware v. Prouse, 440 U.S. 648 (1979), typifies an exception to this general rule. The

circumstances, the Court will require the party seeking review to demonstrate that a federal question is necessarily presented and that the Court's jurisdiction is therefore clear.[5]

Oregon v. Kennedy is precisely the type of case which the Court has customarily remanded for clarification under the Krivda rule.[5] Decision of this case without first giving the Oregon Court of Appeals an opportunity to eliminate any perceived ambiguities in its present opinion would erode sound and long-standing principles of restraint.

A. Federal Law Is Not the Sole Basis for the Court of Appeals' Holding.

1. No constitutional text is cited.

Both article I, section 12, of the Oregon Constitution and the Fifth Amendment to the

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4 (continued)

Prouse case is distinguishable from the Kennedy case in importan ways. See discussion below at pp. 19-27.

5 Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197 (1965).

6 California v. Krivda, 409 U.S. 33, 35 (1972).

United States Constitution contain a prohibition against what is commonly called "double jeopardy."[7] Defendant raised the Oregon Constitution as a defense to his second prosecution. He also raised the same challenge under the federal Constitution. Both clauses were cited and briefed to the Oregon Court of Appeals. See Defendant's Brief p. 8; State's Brief pp. 7-8.

The Oregon court cited neither Constitution in Oregon v. Kennedy. The court's opening paragraph simply stated the error assigned as the "trial court's failure to dismiss the case against [defendant] based upon a theory of prior jeopardy." 49 Or. App. at 417, 619 P.2d at 949. The opinion goes on to refer to "prior jeopardy"

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[7] The relevant language of each clause is set forth for comparison. Or. Const. art. I, § 12:

> No person shall be put in jeopardy twice for the same offence . . . .

U.S. Const. amend. V (as applied to the states by the Fourteenth Amendment):

> [N]or shall any person be subject for the same offence to be twice put in jeopardy.

or the "double jeopardy clause" four more times, always without citation to any constitutional text. Judge Gillette's short discussion adverts to decisional law based solely on the Federal Constitution, United States v. Dinitz and United States v. Jorn, and to decisional law based solely on the Oregon Constitution's double jeopardy clause, State v. Rathbun, supra, but comes to rest openly upon neither. From all that appears in the opinion, the court may even have intended to rule for the defendant on the Oregon common law principle of "prior jeopardy." See, e.g., State v. McCormack, 8 Or. 236 (1880) (Oregon prior jeopardy clause is equivalent to a declaration of the ancient common law principle that no person shall be twice tried for the same offense).

2. State v. Rathbun - controlling state law.

The Court of Appeals' opinion would probably be too indefinite for purposes of confident assumption of federal question jurisdiction even without the court's reliance on State v. Rathbun, 287 Or. 421, 600 P.2d 392 (1979). The citation

to Rathbun, however, demonstrates an adequate and independent state ground for the Kennedy holding. Rathbun, a double jeopardy case decided by the Oregon Supreme Court solely under the state constitution, dictated the result below.

Rathbun held that article I, section 12, of the Oregon Constitution barred retrial of the defendant when prejudicial remarks made by an officer of the court -- a bailiff -- contaminated the jury so as to require a mistrial, even though causing a mistrial was not the bailiff's intent. 287 Or. at 432-33, 600 P.2d at 398. The mistrial in the Kennedy case was similarly provoked by prejudicial remarks before the jury by the prosecutor, also an officer of the court, also without intent to cause a mistrial. 49 Or. App. at 418, 619 P.2d at 949.

The Kennedy result is precisely in keeping with the following key language in Rathbun:

> Undisputably, however, a first trial is a bar to a second where a mistrial is declared because of prosecutorial or judicial misconduct.

287 Or. at 432, 600 P.2d at 398. Unlike the implications of available Fifth Amendment precendent, the concept of prosecutorial "misconduct" is not, according to Rathbun, limited to misconduct intended to cause a mistrial, for the Oregon Supreme Court concluded:

> The state put this officer of the court in the position to wreak havoc and must bear the same burden as when its prosecutor in like manner offends.

287 Or. at 433, 600 P.2d at 398 (emphasis added). This statement strongly implies that unintentional prosecutorial "havoc" will also bar a second prosecution under the Oregon Constitution.[8]

In determining whether the Oregon Court's opinion is grounded on state or federal

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[8] The opionion below also provides reason to believe the Court of Appeals was not persuaded that the federal precedents it cited covered the case at hand. The court's scepticism is recorded in footnote one of the opinion:

> As the text of our opinion, post, indicates, we are not sure that the subjective intent of the prosecutor should necessarily play a pivotal role in the decision as to whether or not prior jeopardy forbids retrial.

49 Or. App. at 418 n.1, 619 P.2d at 949 n.1.

law, the Court must not stop at the bare language of the opinion. The Court must also focus on what in fact the Oregon Court of Appeals has done. The judgment for Mr. Kennedy is in accord with Oregon precedent. The opinion is a correct statement of Oregon double jeopardy law. It is, therefore, unsurprising that the Oregon Supreme Court declined to grant discretionary review of the Court of Appeals' decision. Although denial of review does not necessarily connote approval of the lower court's opinion, the Supreme Court could well have been satisfied that Kennedy had correctly applied the holding of State v. Rathbun.

Rathbun may represent, as the Oregon Attorney General asserts, a "uniquely errant interpretation of jeopardy principles," see Brief for Petitioner State of Oregon p. 37, but it is Oregon law. The propriety of Oregon's

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8 (continued)

The Court's reference is, plainly, to United States v. Jorn, 400 U.S. 470 (1971), and United States v. Dinitz, 424 U.S. 600 (1976), which implied that only a prosecutorial intent to provoke a mistrial bars a second prosecution.

interpretation of its own constitution is not reviewable by this Court, despite the prosecution's displeasure with it. If this Court is persuaded that the holding is compelled by the Oregon Constitution, it must dismiss the writ.

Moreover, Rathbun so clearly dictates the result in Kennedy that the holding seems virtually certain to compel a judgment for the defendant even if the Fifth and Fourteenth Amendments do not. Accordingly, this Court runs the risk of transgressing its long-standing rule against rendering advisory or unnecessary opinions if it decides this case merely to correct the Oregon Court of Appeals' suspected view of federal law.[9] The rule against advisory opinions is well-stated in Herb v. Pitcairn, which declares:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments,

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[9] This Court's decision in South Dakota v. Opperman, 428 U.S. 364 (1976), was subsequently rendered advisory on remand to the South Dakota Supreme Court, which reversed the conviction under its state constitution. State v. Opperman, 247 N.W.2d 673 (S.D. 1976).

> not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

324 U.S. at 125-26 (emphasis added).

The Court has authority to review the case before it only if the federal ground is the sole basis for the decision. Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 198 (1965). The Court can have no such certainty in this case. And, the Court should be doubly wary of assuming jurisdiction when the risk is so plain that the Court's eventual decision will have no effect on this defendant's case.

3. The legally appropriate practice is to dismiss the writ, or, alternatively, to vacate and remand.

The Kennedy opinion, if it does not clearly reflect its state-law underpinnings, is nevertheless well within the class of cases which the Court considers sufficiently ambiguous to warrant dismissal or remand. Relying on the reasoning of California v. Krivda, supra, the Court has vacated and remanded for clarification at

least 17 such decisions in the last 9 terms alone.[10] Many, if not most, of these cases contain considerably less evidence of reliance upon state law -- therefore much less reason to be cautious about the possibly erroneous assumption of jurisdiction -- than does the Kennedy case.

Pennsylvania v. Campana, 414 U.S. 808 (1973), is illustrative. In Campana, a double jeopardy case, the Pennsylvania Supreme Court seemed to ground its decision openly on federal law:

> Presented for consideration in these consolidated appeals is whether appellants . . . were subjected to "Double Jeopardy" in contravention of the Fifth and Fourteenth Amendments of the United States Constitution [citing Benton v. Maryland, 395 U.S. 784 (1969)]. We hold that . . . the second prosecutions violated the Double Jeopardy Clause of the Fifth Amendment.

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[10] See California v. Silvey, 101 S. Ct. 3153 (1981); Michigan v. Peques, 101 S.Ct. 3073 (1981); Washington v. Fitzsimmons, 449 U.S. 977, (1980); California v. Level, 449 U.S. 945 (1980); California v. Superior Ct., 449 U.S. 945 (1980); California v. Braeseke, 446 U.S. 932 (1980); Illinois v. Vitale, 439 U.S. 974 (1978); Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241 (1978); Percy v. Terry, 434 U.S. 808 (1977); General Atomic Co. v. Felter, 429 U.S. 973 (1976); Ohio v. Gallagher, 425 U.S. 257 (1976); Louisiana v.

Commonwealth v. Campana, 452 Pa. 233, 239-40, 304 A.2d 432, 434 (1973) (footnotes omitted). The majority opinion went on to discuss the common law origin of double jeopardy, and the cases decided under the Pennsylvania Double Jeopardy Clause (which had been limited to capital cases only), but did not expressly tie the holding to state law. Both dissenting and concurring judges in Campana viewed the decision as one of federal constitutional law. See 452 Pa. at 269, 304 A.2d at 446 (Pomeroy, J., dissenting) ("The Court does not purport to bottom its decision on any theory of Pennsylvania as distinguished from federal constitutional law."); and 452 Pa. at 256, 304 A.2d at 451 (Eagen, J., concurring) (question for the court is the scope of the Fifth Amendment). Nevertheless, the Supreme Court found sufficient ambiguity

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10 (continued)

Mora, 423 U.S. 809 (1975); Roundhouse Constr. Corp. v. Telesco Masons Supplies Co., 423 U.S. 809 (1975); Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974) (reversed and remanded); Pennsylvania v. Campana, 414 U.S. 808 (1973); Department of Motor Vehicles v. Rios, 410 U.S. 425 (1973); California v. Krivda, 409 U.S. 33 (1972).

to warrant vacating and remanding the case to Pennsylvania for an answer to the Krivda question whether the holding was based on federal or state law. Pennsylvania v. Campana, 414 U.S. 808 (1973).

If the Pennsylvania majority opinion's marginal treatment of state law created an uncertainty which counseled remand--in spite of that court's overt federal holding--then Oregon v. Kennedy, a "prior jeopardy" judgment citing neither Constitution, presents an even more serious question of judicial intent. When the intent is less than completely clear, only remand will avoid the risk of an erroneous assertion of federal jurisdiction.

Unfortunately, it is commonplace for many state judges to announce constitutional law without benefit of textual reference to the applicable law. Thus, of the six state criminal procedure cases in which this Court granted certiorari during the October 1980 Term and then vacated and remanded pursuant to Krivda, four, like Kennedy, invoked no constitutional clauses of any kind, but

relied on decisional law invoking both state and federal constitutional concepts.[11] Two others referred explicitly to various federal constitutional amendments, but were clouded by references to decisions citing neither Constitution[12] or decisions relying on both Constitutions.[13]

B. The Question of the Supreme Court's Jurisdiction in this Case Is Not Answered by Delaware v. Prouse.

Delaware v. Prouse, 440 U.S. 648 (1979), illustrates an exception to the Court's general practice of vacating and remanding whenever the state court relies on the state charter as one ground for its holding. The Court assumed jurisdiction in Prouse because it determined that,

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11 See People v. Silvey, 110 Cal. App. 3d 67, 167 Cal. Rptr. 566 (1980); People v. Level, 103 Cal. App. 3d 899, 162 Cal. Rptr. 682 (1980); People v. Braeseke, 25 Cal. 3d 691, 602 P.2d 384, 159 Cal. Rptr. 684 (1979).

12 See People v. Peques, 104 Mich. App. 45, 304 N.W.2d 482 (1980), aff'd, 410 Mich. 894, 304 N.W.2d 455 (1981) (citing People v. Westerfield, 71 Mich. App. 618, 248 N.W.2d 641 (1976), and others).

13 See State v. Fitzsimmons, 93 Wash. 2d 436, 610 P.2d 893 (1980) (citing City of Tacoma v. Heater, 67 Wash. 2d 733, 409 P.2d 867 (1966)).

despite citation to the Delaware Constitution, the Delaware Supreme Court did not intend to rest its decision independently on the state charter. 440 U.S. at 650-53. Two significant factors led to this conclusion, factors not present in the Kennedy case.

First, the language of the Delaware court's decision itself indicated that the court would initially decide the federal Fourth Amendment question and then automatically tack that holding onto the similar state search and seizure clause. This approach, assuredly, is the opposite of independent analysis. Second, earlier Delaware cases reflected a consistent tradition of reliance on Fourth Amendment cases to find a violation of state law. See 440 U.S. 652-53 n.5. Thus, the Supreme Court was confident that the state court, far from being independent, had felt compelled by federal law to reach the result which the Court then reviewed.

No similar language in the Kennedy opinion evinces this sort of compulsion to follow federal precedents. The Oregon Court of Appeals does not hold that the double jeopardy clauses are necessarily coterminuous. And, a brief review of Oregon decisional law will demonstrate that in criminal procedure cases (including cases involving double jeopardy protection), and in constitutional adjudication in general, Oregon has a firm tradition of vigorous, independent analysis of the state Bill of Rights.

1. Double jeopardy cases.

This independent tradition is strikingly evident in litigation under Oregon's double jeopardy clause, Or. Const. art. I, § 12. Oregon's Constitution was adopted in 1859, nine years before the federal Fourteenth Amendment. See State v. Smyth, 286 Or 293, 297, 593 P2d 1166, 1168 (1979). Early, necessarily "independent" applications of article I, section 12, are reported in State v. McCormack, 8 Or. 236 (1880) (barring two convictions for a unitary crime), and State v. Shaffer,

23 Or. 555, 32 P. 545 (1893) (article I, section 12, not offended by retrial after mistrial due to a "hung jury").

Even after the United States Supreme Court announced in Benton v. Maryland, 395 U.S. 784, 794 (1969), that the double jeopardy prohibition of the Fifth Amendment applied to the states through the Fourteenth Amendment, Oregon continued its tradition of independent double jeopardy analysis The basis for State v. Brown, 262 Or. 442, 497 P.2d 1191 (1972), decided by the Oregon Supreme Court just three years after Benton, could not be clearer:

> We are without clear authority from the Supreme Court when we consider whether a single act or course of conduct which violates more than one statute constitutes one or more offenses within the meaning of the double jeopardy provision of the Fifth Amendment. However, as our own constitution also prohibits a second jeopardy for the same offense, we need not speculate what the Supreme Court will decide. We are free to adopt our own interpretation of our state constitution.
>
> . . . We hold that under Article I, Section 12, of our Constitution, statutory violations may be the "same offense" for purposes of testing a second prosecution, even though each contains different elements and requires proof of different facts.

262 Or. at 453, 497 P.2d at 1196. State v. Rathbun continued this independent tradition, in a different strand of double jeopardy theory, when it declared:

> It seems that there is little to be gained by our attempting to guess what the United States Supreme Court might do under the Constitution of the United States if this case were before that court. We shall dispose of this case under Oregon law although giving proper weight to the statements of [the] United States Supreme Court which we find to touch upon the matter.

287 Or. 421, 431-32, 600 P.2d 392, 397 (1979) (footnote omitted).

2. Other Oregon cases.

Unlike the state of Delaware, the general rule in the Oregon courts when a party raises both state and federal claims is first to decide the effect of the state's own laws before addressing any federal issue. Justice Linde, speaking for the Oregon Supreme Court, has stated the Oregon rule in this way:

> The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism

> or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.

Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981).[14] According to the expressly declared Oregon rule, only if the state law is determined to be adverse to the claimant need the court reach and decide the federal constitutional issues. State v. Clark, 291 Or. 231, 630 P.2d 810 (1981); State v. Scharf, 288 Or. 451, 455, 605 P.2d 690, 692 (1980).[15] This, according to Justice Linde, is so for reasons of logic,[16] among others.

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[14] For a cogent exposition of this approach to the Fourteenth Amendment by Justice (formerly Professor) Linde, see Linde, Without "Due Process" --Unconstitutional Law in Oregon, 49 Or. L. Rev. 125 (1970), especially pp. 133-34.

[15] In Justice Linde's view, a defendant's "equivalent" state and federal constitutional claims are not cumulative but alternative. If the state law grants defendant the "process" that is "due," it follows that the state has not violated the Fourteenth Amendment. Thus, Justice Linde insists on a clear differentiation of federal and state constitutional arguments:

> Convenient as it may be to reduce the diverse federal and state premises in this manner to a single body of "constitutional law," there are two things

Prior to Kennedy, application of this logic produced a substantial body of independent state law analysis, both statutory and constitutional, in areas elsewhere frequently occupied only by federal due process precedents. These areas include: prisoners' rights, Sterling v.

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15 (continued)

> wrong with it. First, it contradicts the hierarchical logic of the federal constitutional premises. Second, the provisions of the federal and Oregon constitutions are not in fact alike.

49 Or. L. Rev. at 133.

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> First, the logical relationship between the state and federal constitutional claims. The federal source of all "due process" and "equal protection" attacks on state regulation is the fourteenth amendment's command that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Whether this command has been violated depends on what the state has finally done. Many low-level errors that potentially deny due process or equal protection are corrected within the state court system; that is what it is for. The state constitution is part of the state law, and decisions applying it are part of the total state action in a case. When the state court holds that a given state law, regulation, ordinance,

Cupp, supra; defendant's right to a prompt trial Haynes v. Burks, 290 Or. 75, 619 P.2d 632 (1980); public and press access to court proceedings, State ex rel. Oregonian Publishing Co. v. Deiz, 289 Or. 277, 613 P.2d 23 (1980); defendant's access to counsel, State v. Scharf, 288 Or. 451, 604 P.2d 690 (1980); right to bear arms, State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); defendant's right to exculpatory evidence, State v.

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16 (continued)

> or official action is invalid and must be set aside under the state constitution, then the state is not violating the fourteenth amendment.
>
> The point is obvious when a conclusion such as "Regulation X denies defendant's rights under the fourteenth amendment and the corresponding sections of Oregon constitution article I" is broken down into its component parts. When a judgment holds with the defendant that the regulation is invalid under the state constitution, it cannot move on to a second proposition invalidating the state's action under the federal Constitution. By the action of the state court under the state constitution, the state has accorded the claimant the due process and equal protection commanded by the fourteenth amendment, not denied it.

49 Or. L. Rev at 133-34 (footnotes omitted).

Spada, 286 Or. 305, 594 P.2d 815 (1979); defendant's right to confront adverse witnesses, State v. Smyth, 286 Or. 293, 593 P.2d 1166 (1979); venue in criminal prosecutions, State v. Roper, 286 Or. 621, 595 P.2d 1247 (1979); right to counsel and to a jury trial, Brown v. Multnomah County Dist. Ct., 280 Or. 95, 570 P.2d 52 (1977); and illegal stops by police, State v. Valdez, 277 Or. 621, 561 P.2d 1006 (1977). This practice continues. See, e.g., State v. Clark, 291 Or. 231, 630 P.2d 810 (1981) ("privileges or immunities"); State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981) (right to bear arms).

Placed in this context, the probability that State v. Kennedy rests on an independent state ground is greatly enhanced.

II.

II. THIS CASE SHOULD BE VACATED AND REMANDED TO THE OREGON COURT OF APPEALS EVEN IF THIS COURT DETERMINES THAT THE LOWER COURT SIMPLY FAILED TO RESOLVE THE STATE ISSUE BEFORE IT.

A. Comity Requires that State Courts Resolve Potentially Dispositive State Issues Before Supreme Court Review.

Even if this Court finds that the Oregon Court of Appeals intended to ground its decision on the federal Fifth Amendment, and also failed to pass on the article I, section 12, issues, the Court should nevertheless remand the case to the Oregon Court of Appeals for resolution of the state constitutional issue which was cited and briefed by the parties. This, in fact, is the approach suggested several years ago by Justice Marshall, when he wrote:

> [W]e have too often rushed to correct state courts in their view of federal constitutional questions without sufficiently considering the risk that we will be drawn into rendering a purely advisory opinion. . . .
>
> . . . .
>
> In addition to the importance of avoiding jurisdictional difficulties, it seems much the better policy to permit

> the state court the freedom to strike its own balance between individual rights and police practices, at least where the state court's ruling violates no constitutional prohibitions. It is peculiarly within the competence of the highest court of a State to determine that in its jurisdiction the police should be subject to more stringent rules than are required as a federal constitutional minimum.
>
> . . . Accordingly, in my view the Court should not review a state-court decision reversing a conviction unless it is quite clear that the state court has resolved all applicable state-law questions adversely to the defendant and that it feels compelled by its view of the federal constitutional issue to reverse the conviction at hand.

Oregon v. Hass, 420 U.S. 714, 726, 728-29 (1975) (dissenting opinion) (emphasis added). Thus, under Justice Marshall's view, whenever an unresolved state law claim was properly before the state court -- either because one of the parties cited the law or because under the rules of the state the court could raise the issue sua sponte -- the Supreme Court should vacate and remand the case, even when the state court seems to have

ignored the state law in deciding the federal law in the defendant's favor.[17]

Although in 1975, a majority of the then constituted Court was not persuaded by this view, Amicus respectfully submits that it is now timely for this Court to reconsider whether the policy suggested by the Oregon v. Hass dissenters -- akin to a rule of comity -- might not better serve the needs of a healthy federalism.

A rule that would encourage state courts to resolve a properly raised state law issue

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[17] Justice Marshall's suggested rule could not, of course, logically be extended to the reverse situation--that is, when the state court has ruled against the criminal defendant on federal grounds, but has failed to pass on cited state grounds. In that situation, the reasons for Supreme Court restraint would vanish. First, in contrast to the case at bar, federal rights might actually have been lost, making Supreme Court intervention imperative. Second, there would be no danger of inadvertent interference with a nonreviewable state ground. Third, there would be virtually no danger of an advisory Supreme Court opinion, since a state court which rules against a defendant on federal grounds, and ignores the cited state constitution, is extremely unlikely, on remand, to discover a state law reason for reversing itself.

before turning to federal law would serve a number of concerns which are, and should be, of importance to this Court. Commentators have articulated some of these concerns:

> The reasons for the adoption of the rule are as follows: it would enable the Court to avoid rendering advisory or unnecessary opinions; it would resolve the perplexing problem of attempting to discern upon which law the lower court's decision rests; in accordance with the doctrine of federalism it would establish a policy of permitting the individual states to strike the delicate balance when the state interest is paramount to the federal interest; it would also help maintain the state's political balance; and finally, it would greatly promote needed judicial economy.[18]

1. Unnecessary or advisory opinions.

The Court has stated that it is not permitted to render an advisory opinion. Herb v.

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[18] Galie & Galie, State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in Oregon v. Hass, 82 Dickinson L. Rev. 273, 280 (1978). The authors provide an excellent review of the implications for federal courts of the "new state court activism" in interpreting state Bills of Rights. They conclude that the basic policy proposed by Justice Marshall is desirable, provided that the Supreme Court, rather than refusing all review of decisions containing unresolved state issues, accepts review and vacates and remands these cases for lower court decision.

Pitcairn, 342 U.S. 117, 125-26 (1945). The reasons for the rule are equally applicable when state issues are raised but not squarely resolved. Whenever there are, on the record, state law grounds which may support the judgment before the court, the state court is free upon remand to reground its judgment on state law. As noted in Part I of the above Argument, this result is likely in the case at bar. The same result will follow with more frequency as more state courts become cognizant of their responsibility to interpret their own constitutions, in ways not necessarily identical to the tests employed to construe counterpart language in the federal Bill of Rights.[19]

2. Avoiding jurisdictional doubts.

The ambiguities frequently encountered in state appellate court opinions presented

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[19] There is also the matter of the differing nature of the texts of the various state constitutions. See Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379, 384-87 (1980).

for Supreme Court review do not allow for an easy and confident answer to federal jurisdiction questions. Employing Justice Marshall's rationale, the Court need only examine the record of a case, facially premised on federal law, to see whether a state law issue arguably decisive of the case was raised below. The Krivda approach of granting certiorari, then vacating and remanding for a decision on the applicable state law, is equally appropriate here. A properly raised but unresolved state issue in the record should be considered to be an "ambiguity" requiring remand.

3. Considerations of federalism and state court innovation.

The Court has repeatedly stated its respect for the independence of state functions, whether legislative or judicial. With increasing frequency, the Court has disapproved of federal intervention when state forums and state laws could resolve state concerns. This broad principle of comity is recognizable in a number of different types of litigation, but has had perhaps its most

familiar application in cases touching upon the state's administration of criminal justice.

In the "abstention" context, the Court, per Justice Black, expressed the principle in Younger v. Harris:

> [The] underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways. . . . [T]he concept [represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

401 U.S. 37, 44, 45 (1971) (emphasis added).

Chief Justice Burger, dissenting in a case striking a state statute as unconstitutional,

has pointed to unresolved state constitutional issues as a reason for noninterference:

> The reason for my dissent is that it seems to me a very odd business to strike a state statute, on the books for almost 40 years, without any opportunity for the state courts to dispose of the problem either under the Wisconsin Constitution or the U.S. Constitution. For all we know, the state courts would find this statute invalid under the State Constitution, but no one on either side of the case thought to discuss this or exhibit any interest in the subject.

Wisconsin v. Constantineau, 400 U.S. 433, 440 (1971) (emphasis added; footnote omitted).

In another context, the principle of comity has restrained federal courts from using their injunctive powers to interfere with state tax laws:

> The reason for this guiding principle [of equitable restraint] is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.

Matthews v. Rodgers, 284 U.S. 521, 525 (1932) (emphasis added).

Most recently, Justice Rehnquist, speaking for the Court, has held that the principle of comity also bars federal courts from granting damage relief in state tax cases, notwithstanding the Court's jurisdiction to do so by virtue of 42 U.S.C. § 1983 and 28 U.S.C. § 1343. Fair Assessment in Real Estate Ass'n v. McNary, 50 U.S.L.W. 4017, 4019 (Dec. 1, 1981).[20]

Amicus does not take the position here that comity should bar the doors of federal trial courts to civil rights litigants. Nevertheless, the Court's deference to state independence, according to these announced principles, is appropriate in cases like the present one.

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20 See also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 477 (1981) (Stevens, J., dissenting) (suggesting that there may be instances where state courts should be given greater latitude in applying federal law even though a reviewing federal court might rule differently).

These principles of comity support the policy stated in Justice Marshall's Oregon v. Hass dissent. Criminal procedure cases involve important relations between the sovereign states and their citizens. To be sure, the federal Constitution binds the states to provide no less in the way of procedural guarantees than is provided in the federal Bill of Rights. But if state law, cited to state courts and left unresolved by them, could provide state solutions to these problems of criminal justice, federal restraint pending their resolution may avoid the need for federal intervention at all.

There is another reason, also arising from the structure of a federal system of government, which makes restraint good policy. Overreliance on federal rights creates centralization of the criminal justice system, discouraging state experimentation. Chief Justice Burger voiced this concern when he stated:

> I add this comment only to emphasize the importance of allowing the States to experiment and innovate, especially in

> the area of criminal justice. If new standards and procedures are tried in one State their success or failure will be a guide to others and to the Congress.

California v. Green, 399 U.S. 149, 171 (1970) (Burger, C.J., concurring).[21]

4. Political balance within the states.

When a state court judge ignores available state law to base a holding on a federal constitutional clause, he or she places that decision beyond the reach of normal state political processes. Voters and legislatures do not learn what their own statutes and constitutions mean when those laws are bypassed by a reference to the federal precedents. State constitutions can be amended, typically with much greater ease than the

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[21] See also Douglas, State Judicial Activism--The New Role for State Bills of Rights, 12 Suffolk U.L. Rev. 1123, 1137 (1978). The author is a Justice of the New Hampshire Supreme Court.

federal charter,[22] if the citizenry disagrees with the judges' result, whether it be too protective or not protective enough of the right claimed. Statutes can implement newly interpreted state guarantees, in sufficient detail to achieve predictability and direction for state government officials. But if state courts are not encouraged to assume responsibility for interpreting and applying state law, these democratic processes at the state level are frustrated. So long as state courts can freely insulate their decisions from popular review by cloaking them in any federal phraseology, these courts place whole areas of important and potentially sensitive legal and political issues beyond the constitutional acountability ordained by state charter.

By encouraging state courts not to evade responsibility for interpreting their own

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22 See, e.g., Or. Const. art. IV, § 1 (constitutional amendment by popular initiative); id. art. XVII, § 2 (constitutional amendment by referral of legislative resolution).

laws, the proposed rule would be a step away from federal dominance of state policy-making and toward reinvigoration of policy at the state level.

5. Judicial economy.

Of course, federal rights may not be sacrificed to judicial economy. The rule counseling remand when state grounds are raised but not resolved should be applied only in those cases where the state court's ruling is not alleged to violate the defendant's constitutional rights, as Justice Marshall suggested in Oregon v. Hass.[23] In this way, the Court's burdened docket can be relieved without impairing minimum federal standards

CONCLUSION

This Court should not decide the federal constitutional issues raised in this case because to do so deprives the state court of an opportunity to dispose of the case on state law issues actually raised by the defendant. Further, in view of settled double jeopardy precedents under the Oregon Constitution, any opinion rendered by this Court

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23 420 U.S. at 728.

is likely to become merely advisory after defendant reasserts his state constitutional rights at the state level. Finally, the principle of comity counsels against unnecessary federal intervention in the conduct of the functions of state governments. Where, as here, state courts can resolve issues of local interest without resort to federal constitutional decision making, they should be encouraged by federal restraint to assume their rightful responsibility to do so.

Respectfully submitted,

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No. 80-1991

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF OREGON, PETITIONER

v.

BRUCE ALAN KENNEDY

ON WRIT OF CERTIORARI
TO THE OREGON COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars retrial of a defendant who successfully moves for a mistrial on the basis of prosecutorial error or misconduct that was not intended to provoke the mistrial request.

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In the Supreme Court of the United States

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THE STATE OF OREGON, PETITIONER

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BRUCE ALAN KENNEDY

ON WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents an important question concerning the effect of the Double Jeopardy Clause when a criminal defendant successfully moves for a mistrial on the ground of prosecutorial or judicial error or misconduct. Although this is a state prosecution, the question presented here arises frequently in federal cases and has divided the federal courts of appeals. Accordingly, the United States has a direct and significant interest in the standard applicable to such cases.

STATEMENT

Respondent was tried in the Circuit Court of the State of Oregon (Multnomah County) on a charge of theft of an oriental rug. The State called Otto Ewaldsen, as an expert witness to identify the rug in question and to estimate its value (Tr. on Appeal 21-32). On cross-examination, defense counsel attempted to establish Ewaldsen's bias against respondent by eliciting the fact that Ewaldsen had once filed a criminal complaint against him (*id.* at 34). Ewaldsen eventually acknowledged that he had filed a complaint charging respondent with fraudulent advertising but that the District Attorney's office had taken no formal action on it (*id.* at 34-35).

On redirect examination, the prosecutor asked Ewaldsen why he had filed the complaint, but the trial judge sustained a series of objections to that line of inquiry (*id.* at 62-66). The Oregon Court of Appeals later stated (Pet. App. 13) that "[t]he objections were not well taken and the judge's rulings were probably wrong." In an answer stricken by the trial judge, Ewaldsen stated that he had filed the complaint because he believed that respondent was guilty of false advertising (Tr. on Appeal at 65). Thwarted in her effort to elicit this damaging testimony by permissible means, the prosecutor then asked (*id.* at 67):

> Q: Have you ever done business with the Kennedys?
>
> A: No, I have not.
>
> Q: Is that because he is a crook?

The court granted respondent's motion for a mistrial, stating (*id.* at 70-71):

> * * * I think your question is—in an effort to rehabilitate him, you certainly are entitled to get some of that in but I think your question went beyond that. Your question, I feel, Miss Johnson [the prosecutor], was highly prejudicial; got right to the heart of it and that it was just uncalled for. I think you went one line beyond, and what you're telling the jury by your question is just exactly what the issue is right here, that he pulled a fast deal. * * * [S]o I think the effect of that is to put in the jury's mind that the man's a crook and therefore he must have done this whether he's guilty of the charge or not.

When the case came on for retrial, respondent moved to dismiss the charges on double jeopardy grounds. At the evidentiary hearing on the motion to dismiss, which was conducted by a second judge, the prosecutor testified that she had asked the fatal question in good faith and had vigorously objected to the request for a mistrial. She noted that she even followed the trial judge into his chambers to ask that he reconsider his ruling (March 17, 1980 Tr. 11, 12, 19).

The motion to dismiss was denied. The judge found that the prosecutor's question, although "improper as put," was not an "intentional impropriety" and was not asked in "bad faith" (March 17, 1980 Tr. 22-23). The judge stated: "[I]t seems apparent that the objectionable statement was made in the course of an attempt to clarify matters which had been brought out on cross-examination, and this, of course, is a proper function of redirect examination" (*id.* at 22). Distinguishing *United States* v. *Kessler*, 530 F.2d 1246 (5th Cir. 1976), upon which respondent relied, the court found no "prosecutorial overreaching," "gross negligence," or "intentional misconduct" and therefore held that double jeopardy principles did not bar retrial (*id.* at 23).

The Oregon Court of Appeals reversed, holding that the prosecutor's question constituted "overreaching." The court elaborated:

> The comment occurred during the redirect examination of a key witness. The prosecutor's express intent was to rehabilitate the witness, who had been impeached. However, the commenting question went beyond rehabilitation and was, in fact, a direct personal attack on the general character of the defendant. As such, we think the prosecutor is charged with the knowledge that the comment—which we must treat as intentional, at least in the sense that it appears it was made deliberately and after some thought—was certain to interfere with the trial process. Defendant then was faced with a Hobson's choice—either to accept a necessarily prejudiced jury, or to move for a mistrial and face the process of being retried at a later time. There will be many circumstances in which the decision, in the face of this dilemma, to seek a mistrial will be deemed the equivalent of a waiver of a defendant's prior jeopardy rights. See *United States* v. *Jorn*, *supra*, 400 U.S. at 485. However, this case of flagrant over-reaching lies outside that general rule.

Pet. App. 14-15. The Oregon Supreme Court denied the State's petition for review.

SUMMARY OF ARGUMENT

1. Our adversary system of criminal justice encourages both prosecutors and defense counsel to apply their skills and their efforts toward the interests of their respective clients. While both operate within prescribed limits of appropriate conduct, and while the prosecutor has a special duty to temper the zeal of advocacy with a careful regard for fair treatment of the accused, it is a fact of legal life, duly recorded in innumerable reported decisions, that from time to time prosecutors exceed the bounds of proper advocacy and inject into the criminal trial errors that so prejudice the defendant's interests as to render any ensuing conviction invalid. Traditionally, the remedy for such occurrences has been to grant a defendant's request for a mistrial or, if the trial proceeds to a conviction, to reverse or vacate the conviction and order a new trial. Only in a narrowly defined category of cases, involving misconduct designed to procure a premature termination of the trial, has the Double Jeopardy Clause come into play to bar a retrial of the charges.

The decision in the instant case, if affirmed by this Court, would radically alter this traditional balance. Many, if not most, instances of prosecutorial misconduct sufficiently serious to justify a mistrial would at the same time bar any retrial. As we show below, such drastic consequences would represent a radical departure from past decisions of this Court, would substantially alter the balance of interests previously struck in double jeopardy cases between the defendant's right to avoid repetitive prosecutions and society's right to secure a resolution of criminal charges, and would create grave practical problems for judicial administration. The existing rule limiting the double jeopardy bar to prosecutorial or judicial misconduct deliberately intended to precipitate a premature termination of the trial should be retained.

2. This Court's decisions firmly establish that "reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request."

United States v. *DiFrancesco*, 449 U.S. 117, 130 (1980). The court below held, however, that double jeopardy principles incorporated in the Due Process Clause of the Fourteenth Amendment preclude retrial following a successful defense mistrial motion based upon prosecutorial "overreaching" even though there is no finding that the prosecution intended to prompt a mistrial request. That decision and similar decisions by several federal courts of appeals are based upon an erroneous interpretation of dictum in the plurality opinion in *United States* v. *Jorn*, 400 U.S. 470 (1971), and are in conflict with previous and subsequent opinions of this Court.

3. The interests served by the Double Jeopardy Clause are fully protected by the rule permitting retrial following a successful defense mistrial motion not deliberately provoked by the prosecution or the court. A defendant has a "valued right to have his trial completed by a particular tribunal" (*Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)), but that right is not absolute. Rather, it is to be weighed against the powerful societal interest in securing a determination of guilt or innocence of one against whom criminal charges have been brought. This is illustrated by the settled rule allowing retrial after reversal of a conviction on appeal or after a mistrial granted over the defendant's objection in cases of "manifest necessary." Moreover, when the defendant moves for or consents to a mistrial, he is not deprived of his "valued right." He may insist upon that right or he may forego it after weighing all the relevant factors, *e.g.*, the likely verdict of the first trier-of-fact; the chances of reversal on appeal; the effect of delay on the prosecution's case and his own, if he intends to present one; the benefits of postponing the date on which service of any sentence would have to begin; and the costs, both financial and emotional, of permitting the first trial to proceed to verdict and of undergoing a second trial.

It is sometimes argued that a prejudicial error by the prosecutor or the judge deprives the defendant of the "valued right to have his trial completed by a particular tribunal" and that the defendant who seeks a mistrial

based upon such error does not freely relinquish that right. However, that argument is based upon a fundamental misunderstanding of the nature of the defendant's right, for while the defendant has a qualified right to a single trial resulting in a final adjudication of guilt or innocence, the defendant has no right to a single errorless trial. Prejudicial error by the prosecutor or judge is one of the risks of trial. The remedy for and deterrent against such error is not dismissal of the indictment under the Double Jeopardy Clause, but the granting of a new trial. Since the prosecution and the trial judge normally have strong incentives for avoiding retrial, that deterrent is usually sufficient. However, this Court has identified a small category of cases in which the threat of mistrial does not suffice, *i.e.*, cases in which the prosecutor or the judge deliberately provokes the defense mistrial request. In those instances, reprosecution is barred, but there is no justification for expanding that narrowly drawn exception.

4. Apart from their lack of a sound theoretical foundation, the decision below and analogous federal decisions departing from the established rule seem likely to produce highly undesirable results in practice. The standards employed in those cases for determining whether reprosecution will be permitted—*e.g.*, whether the defense motion was provoked by prosecutorial or judicial "overreaching," "gross negligence," or "intentional misconduct"—provide little guidance for defendants, prosecutors, or courts. Under such standards, neither defendants, who must decide whether to seek or consent to a mistrial, nor trial judges, who must rule upon mistrial motions, are able to foretell the consequences of their decisions. That confusion is not in anyone's best interests.

Such vague standards also lead to widely divergent and occasionally unjust results, especially since most prosecutorial or judicial errors resulting in mistrials could be characterized as "overreaching" or "gross negligence." If reprosecution were barred in only a fraction of the cases involving such errors, the effect upon the

criminal justice system would be very serious. In addition, nebulous standards like "overreaching" seem likely to encourage lengthy appeals under *Abney* v. *United States*, 431 U.S. 651 (1977), whenever the trial judge allows reprosecution following a mistrial. Finally, such standards may not serve the interests of defendants, because trial judges will naturally be far more hesitant to grant defense mistrial motions if they know that retrial will not be permited or if they are uncertain about the consequences of granting the defendant's request.

ARGUMENT

A DEFENDANT MAY BE RETRIED FOLLOWING A MISTRIAL DECLARED ON HIS MOTION OR WITH HIS CONSENT UNLESS THE MOTION OR CONSENT WAS INTENTIONALLY PROVOKED BY THE PROSECUTOR OR THE JUDGE

A. The Decision Below Is Contrary To Principles Established By A Consistent Line of Decisions of This Court

Just last term, in *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980), this Court stated that "reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request." That rule is firmly rooted in this Court's prior decisions, whereas the decision below and other analogous decisions lack authoritative precedential support.

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[1] "The constitutional provision had its origin in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon. These three pleas prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense." *United States* v. *Scott*, 437 U.S. 82, 87 (1978). See also *United States* v. *Wilson*, 420 U.S. 332, 340 (1975).

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[1] The Double Jeopardy Clause applies to the states through the Fourteenth Amendment. *United States* v. *DiFrancesco*, *supra*, 449 U.S. at 131 n.12; *Benton* v. *Maryland*, 395 U.S. 784 (1969).

Those pleas did not lie, however, unless a verdict of either innocence or guilt was delivered by the trier of fact or unless a pardon was granted. Thus, they had no application to cases in which the jury failed to reach a verdict. *Crist* v. *Bretz*, 437 U.S. 28, 33 (1978); *id.* at 40-41 (Powell, J., dissenting). Indeed, the early common law refused to permit the discharge of the jury until a verdict was returned (*id.* at 36 & n.13 (majority op.), 41-42 (Powell, J., dissenting)).

Influenced by the Double Jeopardy Clause's origins in the common law pleas, the early federal decisions treated the right to discharge a jury before verdict and to retry the defendant as something apart from the question of double jeopardy. In *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), where a trial for a capital offense had ended in a mistrial due to a hung jury, Justice Story, writing for the Court, rejected the argument that the Double Jeopardy Clause applied where a verdict had not been returned. He stated (*id.* at 580):

> We are of opinion, that the facts constitute no legal bar to a future trial. *The prisoner has not been convicted or acquitted, and may again be put upon his defence.*

See also *United States* v. *Haskell*, 26 Fed. Cas. 207 (No. 15,321) (CC.E.D.Pa. 1823); J. Story, *Commentaries on the Constitution* § 1787 (1833). Justice Story then went on to hold, on nonconstitutional grounds, that courts have "the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States* v. *Perez*, *supra*, 22 U.S. (9 Wheat.) at 580.

Eventually discussions of the power to discharge a jury and retry the defendant took on constitutional overtones (*Crist* v. *Bretz*, *supra*, 437 U.S. at 45-47 (Powell, J., dissenting)), and it became established that a defendant was placed in jeopardy even in a prosecution that did not end in a conviction or an acquittal. *Crist* v. *Bretz*,

supra, 437 U.S. at 34; *id.* at 47 (Powell, J., dissenting). See also *Wade* v. *Hunter*, *supra*, 336 U.S. at 688; *Kepner* v. *United States*, 195 U.S. 100, 128 (1904). But while a change occurred in the foundation for the rule governing retrial after a declaration of mistrial, there was no change in the principle that retrial is normally permitted following a mistrial declared with the defendant's consent.

In *United States* v. *Watson*, 28 Fed. Cas. 499, 501 (S.D.N.Y. 1868) (No. 16,651) (emphasis added), the court wrote:

> When the trial of an indictment has been commenced by the swearing of the jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any reason, not made out against him, *unless he consents to the discharging of the jury without giving a verdict*, or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper.

The opinion in *Watson* does not rest upon the Double Jeopardy Clause, nor does its discussion of the defendant's right to have a verdict at the first trial necessarily imply that a premature unconsented termination of the first trial would bar a retrial of the charges. But by the time of the decision in *Wade* v. *Hunter*, the principles expressed in *Watson* had come to be regarded as being embodied in the Double Jeopardy Clause.

Although in intervening years the Court had not addressed the effect of the Double Jeopardy Clause when a mistrial was declared at the defendant's request or with his consent, the Court had decided that a defendant could be retried after his conviction was reversed on appeal. *United States* v. *Ball*, 163 U.S. 662, 672 (1896). See *Burks* v. *United States*, 437 U.S. 1 (1978) (retrial allowed after reversal of conviction on appeal except in cases of insufficient evidence). And all the various rationales advanced over the years to support that rule apply with equal, if not greater, force to the rule per-

mitting retrial, except in limited circumstances, after a successful defense mistrial motion. Thus, if a defendant "waives" his double jeopardy rights by taking an appeal (see *Trono* v. *United States*, 199 U.S. 521, 533 (1905)), making a mistrial motion should also constitute a "waiver." If there is one "continuing jeopardy * * * where criminal proceedings against an accused have not run their full course" (*Price* v. *Georgia*, 398 U.S. 323, 326 (1970)), that principle would apply with even greater force where the first trial terminated before verdict than where a tainted conviction was secured that had to be reversed on appeal. And, if retrial is permitted after a successful defense appeal because barring reprosecution would exact too high a price from society (*Burks* v. *United States*, *supra*, 437 U.S. at 15)), the balance tips even more heavily in favor of retrial where a mistrial is granted with the defendant's acquiescence, not only because such mistrials are far more common than reversals on appeal but also because the underlying errors are frequently much less serious.

Thus, when the Court turned its attention to the double jeopardy problem in cases where a mistrial was declared on defendant's motion or with his consent, the rule permitting retrial except in limited circumstances was virtually foreordained. In *Green* v. *United States*, 355 U.S. 184, 188 (1957), the Court stated that "a defendant is placed in jeopardy once he is put to trial before a jury *so that if the jury is discharged without his consent* he cannot be tried again." The Court added (*ibid.*):

> This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict. At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where "unforeseeable circumstances * * * arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict." *Wade* v. *Hunter*, 336 U.S. 684, 688-689.

In succeeding years, the Court repeatedly made the same two points: that retrial is usually, if not invariably, permitted after a mistrial declared with the defendant's consent and that the Double Jeopardy Clause prohibits retrial when a mistrial is declared to avoid an acquittal or to harass the defendant.[2]

In *Gori* v. *United States*, 367 U.S. 364 (1961), the Court held that retrial was permitted after the trial judge declared a mistrial *sua sponte*. Applying the rule of *Perez* allowing a new trial in cases of "manifest necessity," the Court stated (367 U.S. at 369) (emphasis added):

> Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment—*cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused.*

In *Downum* v. *United States*, 372 U.S. 734 (1963), retrial was barred where the prosecutor obtained a mistrial

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[2] In this brief we are addressing a situation in which the defendant has affirmatively moved for a mistrial, and opinions addressing this subject generally speak of a defendant's motion for or consent to such action. One related issue that has arisen and remains unresolved by this Court concerns the situation in which a trial is terminated before verdict (either by mistrial or dismissal) without the defendant either moving for or objecting to such relief. The question whether silence on the defendant's part, when adequate opportunity exists to express his preference for continuation or termination, constitutes an implied consent to the termination and permits a retrial is presented in our petition in *United States* v. *Dahlstrum*, No. 81-973 (filed Nov. 23, 1981). Our references in this brief to the defendant's motion or consent should not be understood as anything more than a shorthand way of referring to circumstances in which he has failed to assert his "valued right" to have the trial proceed to verdict. As is evident from our petition in *Dahlstrum*, we are of the view that consent to a termination may properly be inferred from the defendant's failure to object to such a course of action as well as from his express request for or agreement to it.

over the defendant's objection, because a key government witness could not be located. The Court wrote (*id.* at 735-736) (emphasis added):

> From *United States* v. *Perez*, 9 Wheat. 579, decided in 1824, to *Gori* v. *United States*, 367 U.S. 364, decided in 1961, it has been agreed that there are occasions when a second trial may be had although the jury impaneled for the first trial was discharged without reaching a verdict *and without the defendant's consent.*

The Court added that retrial would not be allowed in cases involving "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" (*id.* at 736).

The following year, in *United States* v. *Tateo*, 377 U.S. 463 (1964), it was held that a defendant could be retried after the vacation of his conviction on collateral attack. The defendant, who was charged with kidnapping and other offenses, pleaded guilty to the less serious crimes during trial, after the district court judge stated that he would impose a life sentence if the defendant was convicted of kidnapping. The defendant's conviction was set aside in a proceeding under 28 U.S.C. 2255 on the ground that his plea was not voluntary, and this Court subsequently held that the Double Jeopardy Clause did not preclude reprosecution. The Court observed (377 U.S. at 467; emphasis in original): "If Tateo had *requested* a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the Government would not have been barred from retrying him." The Court also remarked: "If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain" (*id.* at 468 n.3).

This Court next addressed these problems in *United States* v. *Jorn*, 400 U.S. 470 (1971), where the district court judge had precipitously declared a mistrial *sua*

sponte. In a plurality opinion announcing the Court's judgment barring retrial, Justice Harlan wrote (*id.* at 485; emphasis added):

> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. *Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.*[12]

[12] Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred. Cf. *United States* v. *Tateo, supra,* [377 U.S.] at 468 n.3 * * *.

This passage—or rather an erroneous reading of this passage—provides the basis for the decision below. The Oregon Court of Appeals justified its decision barring retrial by seizing upon the vague term "overreaching" in the *Jorn* plurality opinion (Pet. App. 15-16). A minority of the federal courts of appeals[3] have taken

[3] In recent years, four circuits have handed down decisions adhering to the rule barring reprosecution after a successful defense mistrial motion unless the motion was deliberately provoked by the prosecutor or judge. *United States* v. *Leppo,* 641 F.2d 149, 152 (3d Cir. 1981); *United States* v. *Roberts,* 640 F.2d 225, 228 (9th Cir. 1981), cert. denied, No. 80-6557 (June 15, 1981); *United States* v. *Rios,* 637 F.2d 728, 729-730 (10th Cir. 1980), cert. denied, No. 80-6336 (June 8, 1981); *United States* v. *Green,* 636 F.2d 925 (4th Cir. 1980), cert. denied, No. 80-6039 (Apr. 20, 1981). The Second Circuit also follows that rule, with the qualification that retrial might be prohibited in an extreme case if "a prosecutor's overreaching is so intentional, so unfair, and so prejudicial that the sanction of barring further prosecution is warranted." *Mitchell* v. *Smith,* 633 F.2d 1009, 1013 (2d Cir. 1980), cert. denied, No. 80-5636 (Jan. 12, 1981). The First Circuit, in rejecting a double jeopardy claim, has stated that where the defendant presses for a mistrial, retrial is forbidden "only if it can be said that the government's claimed

a similar approach. In *United States* v. *Beasley*, 479 F.2d 1124, 1126 (5th Cir.), cert. denied, 414 U.S. 924 (1973), the Fifth Circuit stated that a defense mistrial motion ordinarily removes any barriers to reprosecution but added that "[a]n exception to the waiver of the right against reprosecution exists * * * when the mistrial motion is the product of prosecutorial overreaching." Placing its own gloss on Justice Harlan's term, the court equated "overreaching" with "gross negligence or intentional misconduct" (*ibid.*).[4] In *United States* v. *Kessler*, 530 F.2d 1246, 1256 (5th Cir. 1976), the court relied on the *Beasley* dictum to bar retrial.[5]

Similarly, in *United States* v. *Martin*, 561 F.2d 135 (8th Cir. 1977), the Eighth Circuit held that a success-

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error stemmed from bad faith, an effort to harass or prejudice, or an attempt to provoke a mistrial." *United States* v. *Zozlio*, 617 F.2d 314, 315 (1st Cir. 1980). It is not clear whether or to what extent that dictum represents a departure from the settled rule.

[4] In support of its definition of "overreaching," *Beasley* cited *Wade* v. *Hunter*, 336 U.S. 684 (1949), but there is nothing in that decision even remotely on point.

[5] More recently, however, the Fifth Circuit has questioned whether the *Beasley/Kessler* test survived this Court's subsequent double jeopardy decisions. *United States* v. *Opager*, 616 F.2d 231, 236 n.13 (5th Cir. 1980). The Fifth Circuit has also modified that rule. It has required not simply prosecutorial overreaching but "bad faith prosecutorial overreaching." *Id.* at 234. See also, *e.g.*, *Baker* v. *Metcalfe*, 633 F.2d 1198, 1201 (5th Cir. 1981), cert. denied, No. 80-6340 (May 4, 1981); *United States* v. *Davis*, 589 F.2d 904, 906 (5th Cir.), cert. denied, 441 U.S. 950 (1979); *United States* v. *Crouch*, 566 F.2d 1311, 1317 (5th Cir. 1978). And it has stated the principle that the prosecutorial misconduct must be "egregious enough to warrant the serious sanction of prohibiting reprosecution." *United States* v. *Garza*, 603 F.2d 578, 580 (5th Cir. 1979). See also *United States* v. *Opager*, *supra*, 616 F.2d 237. In addition, some of the court's opinions, without acknowledging any inconsistency, invoke both the *Beasley/Kessler* test and the established rule permitting retrial unless the defense mistrial motion was deliberately provoked by the prosecution or the trial judge. *United States* v. *Bobo*, 586 F.2d 355, 364-365 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); *United States* v. *Kennedy*, 548 F.2d 608, 609 n.1 (5th Cir.), cert. denied, 434 U.S. 865 (1977).

ful defense mistrial motion had been precipitated by "prosecutorial overreaching" and that this barred retrial on double jeopardy grounds. The court failed to define the term "overreaching" except to state that it amounted to something more than "mere negligence" (*id.* at 139). See also *United States* v. *King*, 590 F.2d 253, 256 (8th Cir. 1978), cert. denied, 440 U.S. 973 (1979); *United States* v. *Weaver*, 565 F.2d 129, 133 (8th Cir. 1977), cert. denied, 434 U.S. 1074 (1978). The Sixth Circuit has taken a similar position in dictum. *United States* v. *Enoch*, 650 F.2d 115, 117 (6th Cir. 1981).

The opinion below and those of the Fifth, Sixth, and Eighth Circuits suffer from the same flaws. All wrench the nebulous term "overreaching" out of context and ignore all that this Court has said before and after *Jorn* about the scope of the double jeopardy prohibition following a mistrial declared at the defendant's request. Moreover, both the opinion below and those of the Fifth, Sixth, and Eighth Circuits are guilty of a rudimentary logical error. Justice Harlan wrote in *Jorn* that "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution * * *." 400 U.S. at 485. From that statement—that retrial is allowed when "overreaching" is absent—it does not follow that retrial is barred whenever "overreaching" is found. Furthermore, the footnote to that sentence—which explicates the textual statement by explaining that "reprosecution might well be barred" "where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety *designed to avoid an acquittal*" (*id.* at 485 n.12; emphasis added)—makes it abundantly clear that the *Jorn* plurality did not intend to say that any conduct that might be characterized as overreaching would suffice to bar retrial. If that were what was meant by the sentence in the text of the opinion, the footnote, which states that retrial "might well" be barred if one type of serious misconduct were present, would be both superfluous and a significant understatement.

The Fifth Circuit also misread the *Jorn* plurality opinion in another respect. Justice Harlan's opinion stated

that "bad-faith conduct by judge or prosecutor" (*id.* at 485) is required (although not necessarily sufficient) to bar retrial following a successful defense mistrial motion. The Fifth Circuit cases, which hold that "gross negligence" may preclude retrial, conflict with that statement, since negligence, of whatever degree, is not usually regarded as "bad-faith conduct."

Subsequent decisions of this Court point up the defects in the opinion below. In *United States* v. *Dinitz*, 424 U.S. 600 (1976), the first case to reach this Court in which a mistrial had been declared on defendant's motion, the Court held that retrial was allowed, stating (*id.* at 611):

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," *United States* v. *Jorn*, *supra*, at 485, threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. *Downum* v. *United States*, 372 U.S. at 736. See *Gori* v. *United States*, 367 U.S. at 369; *United States* v. *Jorn*, *supra*, at 489 (Stewart, J., dissenting); cf. *Wade* v. *Hunter*, 336 U.S. at 692.

Applying that standard, the Court concluded that a new trial would not offend double jeopardy in *Dinitz* because the conduct of the trial judge that precipitated the mistrial "was not done in bad faith in order to goad the respondent into requesting a mistrial or to prejudice his prospects for acquittal" (*ibid.*). Clearly *Dinitz* cannot be squared with cases holding that any sort of "overreaching," "intentional misconduct," or "gross negligence" may suffice to bar retrial.

The *Dinitz* holding has been reiterated and emphasized frequently in recent years. See, *e.g.*, *United States* v. *DiFrancesco*, *supra*, 449 U.S. at 130; *United States* v. *Scott*, 437 U.S. 82, 93 (1978); *Arizona* v. *Washington*,

434 U.S. 497, 508 (1978); *Lee* v. *United States*, 432 U.S. 23, 30, 33 (1977).

In sum, this Court's opinions firmly establish that the Double Jeopardy Clause permits retrial after a mistrial is declared on the defendant's motion or with his consent unless the motion or consent was deliberately provoked by the prosecutor or the judge. The decision below and other decisions departing from that rule find no support in this Court's precedents.

B. The Rule Established In This Court's Precedents Fully Protects The Interests Served By The Double Jeopardy Clause

The Double Jeopardy Clause places limitations upon the prosecution's power to retry a defendant after a mistrial has been declared because, in the often quoted language of *Wade* v. *Hunter*, *supra*, 336 U.S. at 689, the mistrial impinges upon the defendant's "valued right to have his trial completed by a particular tribunal." See also, *e.g.*, *United States* v. *DiFrancesco*, *supra*, 449 U.S. at 128; *Arizona* v. *Washington*, *supra*, 434 U.S. at 503; *United States* v. *Dinitz*, *supra*, 424 U.S. at 606. *Arizona* v. *Washington*, *supra*, 434 U.S. at 503-504 (footnotes omitted), explains that "this 'valued right' merits constitutional protection" because a second prosecution "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted."

However, the defendant's "valued right to have his trial completed by a particular tribunal" (*Wade* v. *Hunter*, *supra*, 336 U.S. at 689) is far from absolute. Since *United States* v. *Perez*, *supra*, it has been settled that even if a mistrial is declared over the defendant's objection or without his consent, retrial is permitted in cases of "manifest necessity." Retrial is allowed under those circumstances simply because the defendant's right "is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to

present his evidence to an impartial jury." *Arizona* v. *Washington, supra,* 434 U.S. at 505.

Different considerations obtain when the defendant himself moves for the mistrial or consents to its declaration. "[A] motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." *United States* v. *Scott, supra,* 437 U.S. at 93, quoting *United States* v. *Jorn, supra,* 400 U.S. at 485. "Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact. 'The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.'" *United States* v. *Scott, supra,* 437 U.S. at 93-94, quoting *United States* v. *Dinitz, supra,* 424 U.S. at 609.

When the defendant seeks or acquiesces in the declaration of a mistrial, he is not deprived of the "valued right" protected by the Double Jeopardy Clause. Rather, he has been accorded the opportunity to avail himself of that right, if he chooses, after assessing all the relevant factors: *e.g.*, the likely verdict of the first trier of fact; the chances of reversal on appeal; the effect of delay upon the prosecution's case (and his own case, if he intends to present one); the benefits to be derived from postponing the day on which service of any sentence would have to begin; and the costs, both emotional and financial, of permitting the first trial to proceed to verdict or of undergoing a second trial.

Defendants who successfully seek a mistrial invariably argue, however, that in reality they had no choice at all because the error that prompted the mistrial motion was so prejudicial that continuation of the trial would have been a meaningless exercise. In many cases, that argument is factually false. Not only are mistrials frequently declared in cases in which there has been no reversible error, but "[m]any juries acquit defendants after trials in which reversible error has been commit-

ted, and many experienced trial lawyers will forego a motion for a mistrial in favor of having his case decided by the jury." *United States* v. *Tateo*, *supra*, 377 U.S. at 474 (Goldberg, J., dissenting). Even when the underlying error seriously prejudices a defendant, however, granting a defense mistrial motion is fully consistent with the values served by the Double Jeopardy Clause. As noted in *Dinitz* (424 U.S. at 608):

> [W]hen judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of anxiety, expense, and delay occasioned by multiple prosecutions.

Furthermore, the argument that a defendant's "valued right to have his trial completed by a particular tribunal" is thwarted in this situation is based upon a fundamental misunderstanding of the nature of that right. "[T]he defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error." *United States* v. *Jorn*, *supra*, 400 U.S. at 484. This proposition was effectively settled nearly a century ago when the Court held in *United States* v. *Ball*, 163 U.S. 662 (1896), that the Double Jeopardy Clause does not bar retrial following a successful defense appeal of a conviction. Thus, while a defendant has a qualified right to a single trial resulting in a final adjudication of guilt or innocence, he has no right to a single errorless trial—or even a single trial free of highly prejudicial or reversible error.

As Justice Harlan wrote in *Jorn* (400 U.S. at 479), "a criminal trial is, even in the best of circumstances,

a complicated affair to manage." Especially when a jury sits as the trier of fact, the list of things that can go wrong and can justify the granting of a defense mistrial motion is virtually endless. Before the case can reach the jury, the prosecutor must comply with complex rules of procedure and evidence, many of which are designed to safeguard the defendant's rights. In recent years, these rules have become ever more complicated, and the risks of prejudicial judicial or prosecutorial error have accordingly multiplied. Barring retrial whenever such errors occur and provide the basis for a successful defense mistrial motion "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade* v. *Hunter*, *supra*, 336 U.S. at 688-689. Judicial and prosecutorial errors, including those of a highly prejudicial nature, are simply among the normal risks of litigation, and the Double Jeopardy Clause was not intended to immunize defendants from such risks.

The remedy for and deterrent against most prejudicial trial errors is the declaration of a mistrial. In the vast majority of criminal cases, the prosecution's interest in a single trial resulting in a final adjudication of guilt or innocence is at least as great as the defendant's, and the threat of a mistrial (or a reversal on appeal) therefore effectively deters knowing and deliberate prosecutorial misconduct. While it is true that retrial may impose a severe financial burden on the defendant and may cause him greater emotional strain because of his larger stake in the outcome, the prosecutor too has strong incentives for avoiding a mistrial. It is hardly any secret that both federal and state prosecutorial resources are severely taxed by the massive flow of potential and actual prosecutions, and the burdens of retrials on these limited resources are manifest. Moreover, the balance of tactical advantage from retrials will usually lie with the defense. The prosecution must present evidence and prove its case beyond a reasonable doubt, whereas the defendant can simply put the prosecu-

tion to its proof. Therefore, "[d]elay is not an uncommon defense tactic" (*Barker* v. *Wingo*, 407 U.S. 514, 521 (1972)), for as time passes witnesses may die or disappear, their memories may fade, and tangible and documentary evidence may be lost (*ibid.*). Moreover, because the prosecution presents its case first and because defendants frequently choose not to offer extensive evidence on their own behalf, an aborted first trial will usually reveal far more of tactical value to the defendant than to the government.

In sum, the threat of a mistrial is normally sufficient to deter a prosecutor from improper conduct prejudicial to the defense. That threat also deters prejudicial conduct by overburdened trial judges, who rarely wish to preside over the trial of the same case more than once. That prejudicial prosecutorial and judicial errors occur despite the costs associated with mistrials is simply testimony to the complexity of the governing rules and the fallibility of prosecutors and judges.

There is, however, a small category of cases in which the threat of a mistrial is inadequate to deter prejudicial conduct by the prosecutor or judge. The cases in this category are those in which the prosecutor or judge does not wish to avoid a mistrial but deliberately seeks to provoke a successful defense mistrial request in order to terminate the first trial. The aim may be to harass the defendant through repeated prosecutions. Or the objective may be to use the mistrial "as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." *Illinois* v. *Somerville*, 410 U.S. 458, 469 (1973). In such cases, where the normal sanction of a mistrial is insufficient and where the misconduct is squarely aimed against the defendant's double jeopardy interest in avoiding multiple prosecutions, an additional deterrent is required. The Double Jeopardy Clause serves that function by barring reprosecution when a successful defense mistrial request is intentionally provoked by the prosecutor or the court. In all other cases, however, retrial is permitted after a mistrial is declared at the defendant's request or with his consent.

Several objections to this standard have been voiced or come to mind, but none, in our view, has merit. The court below questioned why a defendant's double jeopardy rights should depend upon the subjective intent of the prosecutor or the judge (Pet. App. 15 n.1). The answer to that question is implicit in what has already been said. In the vast majority of cases, the intent of the prosecutor or judge is irrelevant, for, as a rule, retrial is permitted after a mistrial granted on defendant's motion or with his consent. A narrow exception to that rule has been recognized to deter abusive conduct in those cases in which the normal sanction of a mistrial is insufficient. That exception is keyed to the intent of the prosecutor or judge because of the nature of the oppressive practices sought to be deterred. It would be illogical, therefore, if that narrow exception served to undermine the general rule, which makes no reference to subjective intent.

It may also be objected that the courts are unduly reluctant to find that a mistrial was intentionally provoked by a prosecutor or a fellow judge even if they suspect that to be the case. We are aware of no evidence that the established rule has had such an effect. We acknowledge that the finding required by that rule is probably not a pleasant one for courts to make, but it is not dissimilar to other determinations with which courts are frequently faced in nonjury trials. For example, in civil suits against government officials based upon allegedly unconstitutional conduct, the trier of fact must decide whether the officials had a good faith belief in the legality of their actions. *Butz* v. *Economou*, 438 U.S. 478 (1978); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). Similarly, in libel actions brought by public officials or public figures, the trier of fact must decide whether the news media acted with actual malice. See, *e.g.*, *Herbert* v. *Lando*, 441 U.S. 153, 156 (1979). There is nothing to suggest that the courts have shirked those unpleasant responsibilities, and there is no reason to believe that they will fail to find that a defense mistrial motion has been deliberatedly provoked when the facts warrant.

C. Departing From The Rule Established In This Court's Precedents Would Produce Highly Undesirable Results

The Oregon Court of Appeals held that retrial was barred in the present case because the mistrial resulted from prosecutorial "overreaching" (Pet. App. 15-16). In the federal system, decisions of the Fifth and Eighth Circuits have adopted a test similar to that employed by the Oregon Court of Appeals, with the Fifth Circuit defining "overreaching" as "gross negligence" or "intentional misconduct." [6] The Sixth Circuit has also stated in dictum that "prosecutorial overreaching" may preclude retrial.[7] Apart from failing to strike a reasoned balance between the societal interest in determining the guilt or innocence of persons charged with crimes and the individual interest in avoiding multiple prosecutions for the same offense, such departures from the settled rule are likely to lead to highly undesirable practical consequences.

The first and probably the most serious defect in standards such as "overreaching," "gross negligence," and "intentional misconduct" is their vagueness. The concept of "overreaching," for example, provides little guidance to courts called upon to determine whether a reprosecution may go forward following a successful defense mistrial motion. The literal and primary meaning of "overreaching" is reaching or going too far.[8] Thus, "overreaching" would seem to be present in every case in which a mistrial is caused by prosecutorial error, since by definition prosecutorial conduct that is sufficient prejudicial to the defendant to require a mistrial is conduct that goes too far.

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[6] See, *e.g.*, *United States* v. *Martin*, *supra*, 561 F.2d at 139; *United States* v. *Kessler*, *supra*, 530 F.2d at 1256; *United States* v. *Beasley*, *supra*, 479 F.2d at 1126.

[7] *United States* v. *Enoch*, 650 F.2d 115, 117 (6th Cir. 1981).

[8] *Webster's Third New International Dictionary* 1609 (1976); *Random House Dictionary of the English Language* 1029 (1967).

The potentially expansive scope of the term "overreaching" is confirmed by the opinion of the Oregon Court of Appeals, which provides little basis for distinguishing the prosecutorial error in this case from any other error that results in a mistrial. The court states that the prosecutor's fatal question was "intentional, at least in the sense that it appears it was made deliberately and after some thought" (Pet. App. 15), but presumably every word uttered in court by a prosecutor is uttered "deliberately." And since the fatal question was asked during redirect, rather than direct, examination and was clearly intended to circumvent a series of erroneous rulings by the trial judge, all that the court could have meant when it stated that the comment was made "after some thought" was that the prosecutor had sufficient time to formulate the question in her mind. The court also stated that the prosecution must be "charged with the knowledge that the comment * * * was certain to interfere with the trial process" (Pet. App. 15). The same could be said, however, of any statement that precipitates a mistrial unless a competent prosecutor could not reasonably have anticipated that the statement would result in a successful defense objection or motion to strike or a curative instruction by the judge, not to mention a successful defense mistrial request. Thus, the potential scope of the opinion below is immense.

The federal courts that have adopted the "overreaching" standard have been no more successful in confining it within reasonable limits. The Fifth Circuit has defined "overreaching" as "gross negligence" or "intentional misconduct,"[9] but those terms, however, are no more helpful than the term "overreaching" itself. Just as nearly every prosecutorial error resulting in a mistrial may be termed "overreaching," almost all such errors are probably the product of "negligence," at the least. Negligence means the failure to exercise due care. W. Prosser, *Handbook of the Law of Torts* 145-149 (4th

[9] See page 14 & note 4 *supra*.

ed. 1971); F. Harper & F. James, *The Law of Torts* § 16.1 (1956); *Restatement (Second) of Torts* § 282 (1965). Since mistrials caused by prosecutorial error are rarely inevitable, their occurrence almost invariably means that the prosecutor failed to exercise due care and was consequently negligent.

Requiring "gross negligence," rather than simple negligence, does not help. It has been aptly stated that "gross negligence" is ordinary negligence "with the addition of a vituperative epithet." *Wilson* v. *Brett*, 152 Eng. Rep. 737 (Exch. of Pleas 1843). In torts, from which the term was borrowed, that concept has generally been repudiated. W. Prosser, *Handbook of the Law of Torts* 182 (4th ed. 1971); F. Harper & F. James, *The Law of Torts* § 16.13 (1956). Yet the Fifth Circuit has relied upon the distinction between ordinary prosecutorial negligence and gross negligence in deciding whether to permit retrial following a successful defense mistrial motion. *United States* v. *Luttrell*, 609 F.2d 1190, 1192 (5th Cir. 1980). See also *United States* v. *Fine*, 644 F.2d 1018, 1022 (5th Cir. 1981), cert. denied, No. 81-151 (Dec. 7, 1981).

The other definition of "overreaching" provided by the Fifth Circuit—"intentional misconduct"—may appear somewhat more concrete but upon analysis is equally unsatisfactory. "Intentional misconduct" denotes behavior that the prosecutor knows is improper, and the term is apparently meant to include conduct that would not bar retrial under the rule established in this Court's cases, *i.e.*, conduct not intended to provoke a successful mistrial request. Thus, "intentional misconduct" resulting in a mistrial applies to situations in which the prosecutor engages in improper conduct knowing that his actions are wrong but mistakenly believing that the trial judge will let him get away with it. We doubt that this elaborate construct adds anything of value to the simpler rule long established in this Court's precedents.[10]

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[10] Apparently not content with the vague terms "overreaching," "gross negligence," and "intentional misconduct," the Fifth Circuit has added ambiguous refinements. Thus, later cases require not simply prosecutorial overreaching but "bad faith prosecutorial

The likely effects of vague, ill-defined standards like "overreaching," "gross negligence," and "intentional misconduct" are confusion, inconsistent and inequitable results, and delay. Such terms are so lacking in meaningful content that no litigant or judge will be able to predict with confidence what result they will produce. Thus, defense attorneys who must decide whether to move for or consent to a mistrial will be unable to foretell the probable consequences of such a course of action. Similarly, judges will not know whether granting a defense mistrial motion will make reprosecution impossible. Such confusion does not serve anyone's legitimate interest.[11]

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overreaching." See, *e.g.*, *Baker* v. *Metcalfe*, *supra*, 633 F.2d at 1201; *United States* v. *Opager*, *supra*, 616 F.2d at 234. The court has stated that "bad faith prosecutorial overreaching" requires proof of a bad motive and is consequently a "more demanding" term than mere "prosecutorial misconduct." *United States* v. *Opager*, *supra*, 616 F.2d at 236 n.13. However, the court has not explained what, if any, difference exists between "bad faith prosecutorial overreaching" and "intentional misconduct," a term previously adopted by the court and never abandoned. See, *e.g.*, *United States* v. *Fine*, *supra*, 644 F.2d at 1022; *United States* v. *Beasley*, *supra*, 479 F.2d at 1126. Moreover, despite the plain inconsistency, the court continues to include "gross negligence" within the definition of "bad faith prosecutorial overreaching." *Baker* v. *Metcalfe*, *supra*, 633 F.2d at 1201; *United States* v. *Charette*, 625 F.2d 57, 58 (5th Cir. 1980), cert. denied, 449 U.S. 961 (1980); *United States* v. *Wright*, 622 F.2d 792, 795 (5th Cir. 1980); *United States* v. *Opager*, *supra*, 616 F.2d at 234. Finally, in several cases the Fifth Circuit has resorted to the rule that retrial is barred only if the prosecutorial misconduct is "egregious enough to warrant the serious sanction of prohibiting reprosecution." *Baker* v. *Metcalfe*, *supra*, 633 F.2d at 1203; *United States* v. *Opager*, *supra*, 616 F.2d at 234; *United States* v. *Garza*, 603 F.2d 578, 580 (5th Cir. 1979). Obviously that standard provides little if any guidance to judges, defendants, or prosecutors.

[11] Other possible alternatives to the rule established in this Court's cases are similarly flawed. For example, "recklessness"—the conscious disregarding of a substantial and unjustifiable risk (see *Restatement* (*Second*) *of Torts* § 500 (1965); Model Penal Code § 2.02(2)(c) (Proposed Official Draft 1962))—may be an analytically sounder concept than "gross negligence" but poses similar

The vagueness of these standards will also lead to widely divergent and occasionally unjust results. What one court regards as mundane prosecutorial or judicial error will be viewed by another as "overreaching."

The present case illustrates the broad potential for disagreement about what constitutes "overreaching," since it is not even apparent that the prosecutor's conduct here warranted a mistrial, let alone dismissal of the indictment. The mistrial was declared because the prosecutor asked the following questions during redirect examination of Otto Ewaldsen, an expert witness called by the State to establish the value of the rug allegedly stolen by respondent (Tr. on Appeal 67):

> Q: Have you ever done business with the Kennedys?
>
> A: No, I have not.
>
> Q: Is that because he is a crook?

Precisely why the trial judge felt that a mistrial was warranted is not clear. The fact that Ewaldsen believed the defendant to be a criminal had already been brought out by *defense* counsel during cross-examination when, in an effort to show bias, he elicited the fact that Ewaldsen had previously filed an unrelated criminal complaint against the defendant. Moreover, by pursuing that line of questioning, defense counsel opened the door for redirect examination concerning Ewaldsen's reason for filing that complaint. The prosecutor attempted to question Ewaldsen on that point but, as the Oregon Court of Appeals later stated (Pet. App. 13), the trial judge improperly sustained defense objections to her questions. If permitted to answer those questions, Ewaldsen would

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problems in the present context. Since prosecutors presumably know most of the rules governing their conduct at trial, as well as the risks incurred by transgressing those rules, most misconduct resulting in mistrials could be termed reckless. Furthermore, while there is a voluminous body of precedent distinguishing between negligence and recklessness in the fields of criminal law and torts, there is nothing comparable to aid courts in drawing the line between prosecutorial negligence resulting in a mistrial, on the one hand, and prosecutorial recklessness, on the other.

have presumably testified that he had filed the complaint because he believed the defendant was guilty of criminal conduct. Prevented from eliciting that damaging testimony by permissible means, the prosecutor asked the question that resulted in the mistrial. Thus, the import of the prosecutor's fatal question—that Ewaldsen believed that respondent was a criminal—was already apparent to the jury and was a legitimate topic for redirect examination.

If the substance of the prosecutor's question did not precipitate the mistrial, the cause must have been the use of the epithet "crook." However, other courts have refused to declare mistrials or to reverse convictions despite the prosecutor's use of that same term,[12] not to mention far more inflammatory language.[13] In addition, it seems doubtful that the term "crook" would inflame, prejudice, or make a lasting impression upon a modern juror accustomed to contemporary speech.[14]

Whether a mistrial was properly declared is not, of course, the issue before this Court. But it is revealing that the prosecutor's relatively innocuous question could be termed fatal "overreaching" by the Oregon Court of Appeals. If the prosecutor's question here constituted

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[12] See, *e.g.*, *United States* v. *Alley*, No. 81-1447 (8th Cir. Oct. 20, 1981), slip op. 3; *United States* v. *Singer*, No. 80-1983 (8th Cir. Oct. 5, 1981), slip op. 15.

[13] See *United States* v. *Wolfson*, 322 F. Supp. 798, 826-827 (D.Del. 1971), aff'd, 454 F.2d 60 (3d Cir.), cert. denied, 406 U.S. 924 (1972).

[14] Conceivably the trial judge granted the mistrial request (and improperly sustained the earlier, related defense objections) in an effort to shield the defendant from the consequences of his attorney's arguably ill-advised strategy of eliciting from Ewaldsen on cross-examination the fact that he had filed a criminal complaint against the defendant on a previous occasion. Presumably there were sound reasons for defense counsel's decision, but his strategy was likely to strike an experienced trial judge as risky and highly unconventional. If the trial judge was influenced by such considerations, it would be ironic indeed to hold that retrial is barred.

"overreaching," then, as we have said, virtually any prosecutorial or judicial error resulting in a mistrial may fall within the scope of that term. The number of cases in which mistrials are declared due to prosecutorial or judicial error is substantial. If retrials were barred in only a fraction of those cases, the effect upon the administration of justice would be considerable indeed. See *United States* v. *Jorn*, *supra*, 400 U.S. at 483-484; *United States* v. *Tateo*, *supra*, 377 U.S. at 466.

The untoward effects of vague standards such as those discussed above are compounded in the federal system by the rule permitting an appeal under 28 U.S.C. 1291 whenever a motion to dismiss an indictment on double jeopardy grounds is denied. *Abney* v. *United States*, 431 U.S. 651 (1977). Under the established rule, the critical issue—whether the mistrial motion was deliberately provoked by the prosecutor or judge—is a question of fact and, at least in the federal system, the district court's finding is binding on appeal unless "clearly erroneous." [15] Accordingly, once the district court makes its finding, the double jeopardy issue is effectively settled in most cases. Either the government or the defendant may appeal an adverse decision,[16] but the delay caused by such appeals may be minimized through summary affirmances. In addition, when the district court finds no intent to provoke a mistrial and permits reprosecution, the trial need not always be stayed pending appeal. By contrast, if retrial depended upon a mixed question of fact and law, such as "overreaching" or "gross negligence," significant delay might be inevitable, thereby undermining many of the interests that the Double Jeopardy Clause was intended to serve.

Finally, the vague and broad standards adopted by the Oregon Court of Appeals and some federal courts may not ultimately serve the best interests of defendants. Since the established rule permits retrial after a success-

[15] See, *e.g.*, *United States* v. *Green*, *supra*, 636 F.2d at 928; *Moroyoqui* v. *United States*, 570 F.2d 862, 864 (9th Cir. 1977).

[16] Appeal by the government is authorized by 18 U.S.C. 3731.

ful defense mistrial motion except in a few clearly-defined circumstances, trial judges can feel free to grant such motions whenever they suspect that the fairness of the trial has been impaired. If, on the other hand, granting a defense mistrial motion would often or ordinarily preclude further prosecution or if the trial judge were uncertain about the effect of granting such a motion, "it is at least doubtful that * * * courts would be as zealous as they now are in protecting against the effects of improprieties" at trial. *United States* v. *Tateo*, *supra*, 377 U.S. at 466. See also *United States* v. *Dinitz*, *supra*, 424 U.S. at 610 & n.12; *Gori* v. *United States*, *supra*, 367 U.S. at 369-370.

CONCLUSION

The judgment of the Oregon Court of Appeals should be reversed.

Respectfully submitted.

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